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NO. 87-5546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner

v.

JAMES A. LYNAUGH, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Did jury instructions given pursuant to article 37.071(b) of the Texas Code of Criminal Procedure deprive the jury of any procedure for considering and expressing the conclusion that the mitigating evidence called for a sentence less than death?

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CITATION TO OPINIONS BELOW

The opinion of the court of appeals is reported at 823 F.2d 98 (5th Cir. 1987), and is set out at pages 32-34 of the Joint Appendix (JA). The order and memorandum of decision by the United States District Court, Western District of Texas, are unreported. JA 21-30.

JURISDICTION

The opinion of the court of appeals was delivered on July 30, 1987. The petition for writ of certiorari was filed on September 25, 1987, and certiorari was granted on October 9, 1987. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States. It also involves section 19.03 of the Texas Penal Code and article 37.071 of the Texas Code of Criminal Procedure. The text of these provisions is set out in Appendix A.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

Donald Gene Franklin was charged by bill of indictment which alleged that he committed the offense of capital murder by intentionally causing the death of Mary Margaret Moran in the course of robbery, kidnapping and aggravated rape, in violation of § 19.03(a)(2) of the Texas Penal Code. JA 5-6. Trial was before a jury which convicted Mr. Franklin of capital murder. At

the punishment hearing, the jury answered affirmatively both special issues submitted under article 37.071(b) of the Texas Code of Criminal Prccedure. Accordingly Mr. Franklin was sentenced to death. JA 18-20. The conviction and sentence were affirmed on direct appeal. Franklin v. State, 693 S.W.2d 420 (Tex. Crim. App. 1985). Certiorari was denied. Franklin v. Texas, 106 S. Ct. 1238 (1986). The particular question presented in this brief was not raised on direct appeal.

Mr. Franklin then filed an application for writ of habeas corpus in the state trial court pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 1977). The question presented in this brief was raised in the habeas application in two related grounds. First, Mr. Franklin contended that the trial court had erred in refusing his special requested instructions on mitigating evidence. Second, he contended that appellate counsel was ineffective for not raising this issue on direct appeal. The trial court recommended that relief be denied, and, on April 8. 1986, the Texas Court of Criminal Appeals denied relief on the application for writ of habeas corpus.

Mr. Franklin next raised this question in a petition for writ of habeas corpus filed in the United States District Court for the Western District of Texas, pursuant to 28 U.S.C. § 2254. Following an evidentiary hearing, the United States Magistrate recommended that the petition be denied. Mr. Franklin objected to the findings, conclusions and recommendation of the magistrate. After conducting a de novo review, the district

court adopted the magistrate's recommendation and denied the petition for writ of habeas corpus. JA 21-29.

On appeal the United States Court of Appeals for the Fifth Circuit affirmed. Franklin v. Lynaugh, 823 F.2d 98 (5th Cir. 1987). JA 32-34. No motion for rehearing was filed.

B. Material Facts

Mary Margaret Moran was a staff nurse employed by the Audie Murphy Veteran's Hospital in San Antonio, Texas on July 25, 1975. [R.VIII--2046-2047][1] She was last seen on that night approximately 11:50 p.m., just before the end of her shift. [R.VIII--207)] Five days after her disappearance, on July 30, 1975, Ms. Moran was found alive in a field a short distance from the hospital. [R.X--2514, 2521] When found she was "very lucid and clear" and able to talk. [R.X--2641] At her request she was taken to the Methodist Hospital, where she died at approximately 6:30 a.m. on July 31, 1975. [R.X--2620, 2628, 2641] According to the state's medical witness, the cause of death was "shock, multiple stab wounds to the body, dehydration, and blood in the left chest cavity." [R.X--2628]

The evidence against Mr. Franklin was wholly circumstantial, consisting primarily of evidence which linked him to the car in which Ms. Moran was apparently abducted. Two eyewitnesses identified Mr. Franklin as the driver of the car. One saw him

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1. In this brief, "T.," followed by a volume and page number, refers to the transcript in the state trial court, which contains the documents, pleadings, motions and orders. "R," followed by a volume and page number refers to the statement of facts in the state trial court.

shortly after midnight in the hospital parking lot. He testified that he got a good look at the man, although he was depending on artificial illumination at a distance of 30 to 35 feet. [R.VIII--2120-2121] The second witness also saw him driving the car from the hospital parking lot. This witness, a security guard at the hospital, attempted unsuccessfully to stop the car. [R.VIII--2201-2203] At trial, Mr. Franklin's attorney asked this witness whether he had mistakenly identified another person as the driver of the vehicle in a previous trial. [R.VIII--2239-2241] Although the witness acknowledged making a mistake, he also appeared to blame the court reporter for misunderstanding his testimony. [R.VIII--2241-42]

The car that left the hospital lot that night was traced to Mr. Franklin. [R.IX--2006, 2213, 2261, 2293] At approximately 2:00 a.m., the police arrived at Mr. Franklin's house, found the car parked in front of his house, and observed blood in it. [R.IX--2262-64] Mr. Franklin was then arrested, and his car and house were searched. Blood, hair, and soil in the car revealed that it was probably the vehicle in which Ms. Moran was abducted and taken to the field. [R.X--2597-98, 2626, 2662, 2682-83] Clothing found inside Mr. Franklin's house had blood on it and appeared to be connected to the abduction of Ms. Moran. [R.X--2591-94, 2700, 2678-86] In a trash can outside his house, several items of Ms. Moran's personal property were found, [R.IX--2407], as well as a knife. [R.X--2687]

Mr. Franklin made no inculpatory statement. Further, there

was no unequivocal physical evidence linking Mr. Franklin personally and directly to the commission of this crime. His fingerprints were not found on any of Ms. Moran's personal items that were found in the trash can outside his house. Similarly, even though Ms. Moran was apparently assaulted initially when she was in her car at the hospital parking lot, [R.VIII--2208-12], Mr. Franklin's fingerprints were not found on or inside her car. [R.VIII--2112-13]

In the defense case during the guilt-innocence phase of the trial Mr. Franklin did not testify. He called two witnesses who testified about the medical treatment Ms. Moran received at the Methodist Hospital. [R.XI--2754, 2763] One of these witnesses, Harvey Cox, testified that he was the paramedic who attended Ms. Moran. [R.XI--2756] He had wanted to take Ms. Moran to the Bexar County Hospital because it was better staffed and equipped to handle an emergency. [R.XI--2757] He was overruled, however, by a doctor on the scene. [R.XI--2757][2]

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2. Mr. Franklin sought to prove as well that the crime had been committed by an acquaintance of his, Eugene "Smokey" Tealer. Evidence was offered to the trial court, outside the jury's presence, showing that Tealer had been employed at a nearby medical complex in July, 1975, [R.XI--2780], and that he had worked on July 25, 1975 from 3 p.m. until 11.30 p.m. [R.XI--2786] Tealer had been convicted of abducting, raping at knife point, and brutally beating, a Veteran's Administration Hospital nurse, prior to trial but after the killing of Ms. Moran, on February 18, 1976. [R.XI--2795-2801] Mr. Franklin also attempted to prove that Tealer bore a physical resemblance to him, [R.XI--2791], and that Franklin had loaned his vehicle to Tealer twice prior to July 25, 1975. [R.XI--2828]

The state objected to this proffered evidence, and with a limited exception, the objection was sustained "until such time as you have evidence which directly relates Eugene Tealer III to

Prior to commencement of the trial, the state abandoned the portion of the indictment alleging murder in the course of aggravated rape, electing to proceed instead on the theory that the murder was committed in the course of robbery and kidnapping. [R.III--688] The jury was instructed accordingly, and, it was also instructed on the lesser included offense of murder. [T.I--28-32] The court also charged the jury that this was "a case depending for conviction on circumstantial evidence." [T.I--33]

The state recognized in its summation that this was a circumstantial evidence case, [R.XII--2870], but further argued that it was well investigated and solid and that the evidence clearly showed Mr. Franklin guilty beyond a reasonable doubt. [R.XII--2902]

Mr. Franklin's attorneys, on the other hand, contended that there were two central issues in the case. [R.XII--2884] First, counsel argued that Mr. Franklin was mistakenly identified by the two eyewitnesses. [R.XII--2886, 2900] Second, and alternatively, counsel submitted that, assuming Mr. Franklin killed Ms. Moran, he lacked the specific intent to do so, and was guilty only of murder, not capital murder. [See T.I--32] In support of this latter theory, counsel reminded the jury of testimony and medical records indicating that Ms. Moran was

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this offense." [R.XI--2753] While the court would have admitted the testimony that the car had been loaned to Tealer twice previously, [R.XI--2853], defense counsel declined to offer this testimony, contending that it was "meaningless unless the jury is permitted to know who Eugene Tealer is and what his subsequent offenses have been and he was known to the police department on July 26, 1975." [R.XI--2854]

"seriously mismanaged in the hospital." [R.XII--2895-2899] The jury deliberated for almost five hours before finding Mr. Franklin guilty of capital murder. [T.I--13A]

At the punishment phase of the trial, the state called four police officers who testified Mr. Franklin had a bad reputation as a peaceful and law-abiding citizen. [R.XIII--2925-2934] Phylis Green testified that Mr. Franklin had raped her in 1974. [R.XIII--2935] And finally, the state proved a prior conviction for rape. [R.XIII--2946] The parties stipulated that Mr. Franklin had no record regarding disciplinary violations while incarcerated at the Texas Department of Corrections from 1971 until 1974 and from 1976 until 1980. [R.XIII--2952-2953]

Mr. Franklin submitted five special requested instructions seeking to inform the jury that it must consider relevant mitigating circumstances when determining the appropriate sentence. [T.I--47-51]; JA 7-12. Although timely submitted, the requests were not included in the charge. [R.XIII--2953] This procedure employed by Mr. Franklin preserved error under Texas law. See Tex. Code Crim. Proc. Ann. art. 36.15 (Vernon 1981). The one page charge on punishment actually submitted, and the accompanying special issues, did not mention the word "mitigation." [T.I--53-54]. Only special issues numbers one and two were submitted to the jury. Tex. Code Crim. Proc. Ann. art 37.071(b)(1) & (2)(Vernon 1981). After approximately five hours of deliberation, the jury answered both questions "yes," and the court sentenced Mr. Franklin to death. [T.I--13B-13C].

SUMMARY OF THE ARGUMENT

The sentencing jury was asked two statutory questions to determine whether Donald Franklin would live or die. These questions were concerned solely with whether the murder was committed deliberately and with the probability that Mr. Franklin would be dangerous in the future. Given the narrowness of the questions, the evidence before the jury pointed strongly to affirmative answers to both. In addition to the evidence which supported the affirmative answers and, therefore, a death sentence under Texas law, there was also evidence that weighed in favor of a sentence less than death. Because of the restrictive nature of the statutory questions, however, there was no procedure through which the jury could give effect to its view of the mitigating evidence. In an effort to remedy this problem, Mr. Franklin's attorneys requested jury instructions which would have explicated and broadened the facially narrow special issues to include consideration of the mitigating evidence offered in this case. These instructions were not given, and, as a result, the jury was precluded from considering relevant mitigating evidence, permitted to exclude that evidence from consideration, and prevented from giving independent weight to that evidence. This was inconsistent with the Eighth Amendment.

The constitutional defects in Mr. Franklin's sentencing proceeding did not arise because of unique misapplication of the Texas death penalty statute in his case. They occurred because the Texas statute lends itself to constitutionally defective

application respecting the jury's consideration of mitigating evidence. Although in Jurek v. Texas, 428 U.S. 262 (1976), the court was led to believe "that in considering whether to impose a death sentence the [Texas] jury may be asked to consider whatever evidence of mitigating circumstances the defense can bring before it," Id. at 273, that promise has proven to be hollow. The Texas courts have consistently refused to require instructions that would assure the jury's consideration of mitigating evidence and that would provide a mechanism for the jury to impose a life sentence on the basis of mitigating evidence. Standing alone among the states in its refusal to assure that its capital sentencing scheme satisfies the mandate of Lockett v. Ohio, 438 U.S. 586 (1978), Texas abets the very Lockett error that occurred in Mr. Franklin's trial.

ARGUMENT

I.

MR. FRANKLIN'S SENTENCING VIOLATED LOCKETT V. OHIO BECAUSE, UNDER THE INSTRUCTIONS GIVEN, THE JURORS WERE DEPRIVED OF ANY PROCEDURE FOR CONSIDERING AND EXPRESSING THE CONCLUSION THAT THE MITIGATING EVIDENCE CALLED FOR A SENTENCE LESS THAN DEATH

A. Introduction

At the conclusion of Mr. Franklin's sentencing trial, the jury was instructed, in accord with the Texas capital sentencing statute, that his sentence would be based upon its answers to two questions. These questions, concerned with whether the homicide had been committed deliberately and with whether Mr. Franklin would likely be dangerous in the future, were to be answered "yes" or "no." [T.I--54]; JA 13-16.[3] The jury was given no direction concerning the evidence it was to consider in answering these questions. It was told only to answer the questions and was not given any other way to speak to Mr. Franklin's sentence. The jury was informed that if it answered both questions

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3. The questions were the following:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

[T.I--54]; JA 13-16.

affirmatively, the court was required to sentence Mr. Franklin to death, but that if it answered only one of the questions affirmatively, the court was required to sentence him to life imprisonment. Id.

The evidence before the jury dramatically invited affirmative answers to the two "special issue" questions that were presented. The jury had already convicted Mr. Franklin of intentionally causing the death of Ms. Moran in the course of robbery and kidnapping. [T. I--38]; JA 19. That verdict logically entailed a "yes" answer to the question whether the homicide was "committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." In the sentencing trial, the state presented evidence to show that Mr. Franklin had previously been convicted of rape, that he had committed another rape (prior to the murder of Ms. Moran) upon his release from prison, and that he had a reputation for violence in the community. This evidence clearly supported, if not compelled, the finding of "a probability" that Mr. Franklin "would commit criminal acts of violence that would constitute a continuing threat to society."

The jury also had before it evidence that weighed in favor of a sentence less than death. The state's evidence of guilt was wholly circumstantial, "which however strong leaves room for doubt that a skilled attorney might raise to a sufficient level that, though not enough to defeat conviction, might convince a jury and a court that the ultimate penalty should not be exacted,

lest a mistake may have been made." King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). See Lockhart v. McCree, 106 S.Ct. 1758, 1769 (1986)(recognizing that "the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase"). In addition, the state stipulated to evidence that Mr. Franklin had a good prison record. As this Court has explained, "[i]t can hardly be disputed" that evidence that the defendant "ha[s] been a well behaved and well-adjusted prisoner" is "relevant evidence in mitigation of punishment." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). Unquestionably, "the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison." Id.

The problem which faced the jury in its deliberations upon Mr. Franklin's case under the instructions given was that even if the jurors concluded that the mitigating evidence called for a sentence less than death, they had no procedural mechanism through which to express that conclusion. The jury was not informed that the mitigating evidence might be considered as bearing upon the two special issues, to which it was not self-evidently relevant, nor that it might bear independently upon the choice of sentence. The jury was told only to answer the two questions yes or no. Neither through these verdicts nor outside of them could the jury voice its view of the effect, if any, that

it thought the mitigating evidence should have. As the Fifth Circuit has recently described this problem in another case,

> The jury was allowed to hear all evidence that might mitigate the culpability of [the petitioner's] deeds or his person. The jury could then consider (i.e. think about) the bearing of all of the evidence, aggravating and mitigating, upon the ultimate question of whether [petitioner] should be put to death. If, however, that consideration should lead the jury to decide against the death sentence, how is the decision given effect and incorporated into the verdict? No interrogatory asks about that most crucial decision. Having said that it was a deliberate murder and that [petitioner] will be a continuing threat, the jury can say no more.

Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 674-75.

Recognizing this problem, in Mr. Franklin's case his lawyers tendered various instructions which sought to provide a procedural mechanism through which the jury could give effect to its view of the mitigating evidence. For, although the Texas Court of Criminal Appeals in Jurek said,[4] and this Court in Jurek therefore assumed,[5] that the Texas statute allowed room for consideration of any feature of the defendant or the crime which was put forward by the defense as mitigating, the unexplicated special issues provided no way in which that could be done in connection with Mr. Franklin's particular mitigating evidence. Counsel therefore drafted an array of instructions that sought to

4. Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975).

5. Jurek v. Texas, 428 U.S. 262 (1976).

fit Mr. Franklin's mitigating evidence into every possible chink in the Texas statutory framework.

Thus, proposed instructions One and Two would have told the jury that it could consider the mitigating evidence as bearing upon the ultimate questions of fact framed by the special issues:

> You are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense which have been admitted in evidence before you, may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer to any of the Special Issues is 'Yes'; and in the event such evidence does so cause you to have such a reasonable doubt, you should answer the Issue 'No.'

[T.I --47]; JA 7. (Defendant's Special Requested Charge on Punishment No. One).

> An answer of 'No' may be given to any of the issues . . . if evidence of any such mitigating factors causes at least ten (10) jurors to have a reasonable doubt as to whether the true answer to the issues is 'Yes.'

[T.I--48]; JA 8. (Defendant's Special Requested Charge on Punishment No. Two)(in pertinent part).

Proposed instructions Two, Three, Four, and Five offered alternative ways in which the jury could express the view that Mr. Franklin's mitigating evidence independently called for a life sentence despite its lack of bearing upon the ultimate questions of fact framed by the special issues:

> An answer of 'No' may be given to any of the issues . . . if at least ten (10) jurors find that mitigating factors against the

> imposition of the Death Penalty exist, either in regard to any aspect of the Defendant's character or record, or in regard to any of the circumstances of the commission of the offense which have been admitted in evidence before you . . . .

[T.I--48]; JA 8. (Defendant's Special Requested Charge on Punishment No. Two)(in pertinent part).

> You are instructed that you may answer any of the Special Issues 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T. I--49]; JA 10. (Defendant's Special Requested Charge on Punishment No. Three).

> You are instructed that you may answer Special Issue No. One 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T.I--50]; JA 11. (Defendant's Special Requested Charge on Punishment No. Four).

> You are instructed that you may answer Special Issue No. Two 'No' if you find any aspect of the Defendant's character or record or any of the circumstances of the offense as factors which mitigate against the imposition of the death penalty.

[T.I--51]; JA 12. (Defendant's Special Requested Charge on Punishment No. Five).

Counsel for Mr. Franklin thus attempted in every conceivable way to have the commands of Lockett v. Ohio honored within the Texas statutory framework, but he was rebuffed at every turn. As we will show, that was constitutional error.

B. The Lockett Error in Mr. Franklin's Case: His Jury Was Precluded From Considering Relevant Mitigating Evidence, Permitted To Exclude That Evidence From Consideration, And Prevented From Giving Independent Mitigating Weight To That Evidence

The rules derived from Lockett v. Ohio, 438 U.S 586 (1978), "are now well established . . . ." Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). See also Hitchcock v. Dugger, 107 S.Ct. 1821, 1822 (1987). These rules require that the sentencer:

(a) "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," Lockett v. Ohio, 438 U.S. at 604 (emphasis in original):

(b) not be permitted to "exclud[e] such evidence from [his or her] consideration," Eddings v. Oklahoma, 455 U.S. 104, 115 (1982)(emphasis supplied); and

(c) not be "prevent[ed] . . . from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation," Lockett v. Ohio, 438 U.S. at 605.

All of these rules were violated in Mr. Franklin's sentencing proceeding.

1. Residual Doubt About Mr. Franklin's Guilt

Viewed in its totality, the evidence presented in the guilt-innocence phase of Mr. Franklin's trial left some room for doubt about his guilt. As argued by the defense, this doubt fell into three categories. First, the defense argued that Mr. Franklin

was mistakenly accused of this crime, because he had been misidentified as the person driving his car at the time the victim was apparently being abducted in the car. [R.XII--2885-2890][6] The defense pointed out the lack of scientific evidence tying Mr. Franklin directly to the offense and urged that it was reasonable to believe that another person could have borrowed Mr. Franklin's car that night and been misidentified as Mr. Franklin. [R.XII--2891-2892] Second, the defense argued that the killing was not committed with the specific intent to kill necessary for the offense of capital murder in Texas. [R.XII--2893-2896][7] Third, the defense argued that Ms. Moran "may have been saved" had she been taken to an appropriate hospital after she was discovered. [R.XII--2899-2900]

The fact that Mr. Franklin's jury determined, notwithstanding defense counsel's argument, that he was guilty beyond a reasonable doubt "does not necessarily mean that no juror entertained any doubt whatsoever." Smith v. Balkcom, 660

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6. Two witnesses identified Mr. Franklin as the driver, but the defense argued that their identifications were suspect--one witness because he was thirty or more feet away, at night, and could give only a general description of the driver; the other, because he was motivated to maintain his identification of the driver as Mr. Franklin in order to justify his status as a "hero," even though in a previous trial he had identified Mr. Franklin's lawyer as the driver. See R.XII--2887-2888.

7. Mr. Franklin was charged with the form of capital murder that requires that the defendant "intentionally commit[] the murder" in the course of committing or attempting to commit one or more of five enumerated felonies. See Section 19.03(a)(2) of the Texas Peral Code (Vernon 1974).

F.2d 573, 580 (5th Cir. 1981), cert. denied, 459 U.S. 882 (1982)(emphasis in original). As the Fifth Circuit explained,

> There may be no reasonable doubt--doubt based upon reason--and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt--this absence of absolute certainty--can be real.

Id (emphasis in original). In the circumstances of Mr. Franklin's case, the doubt about guilt urged by the defense arguably created an "absence of absolute certainty."

This residuum of doubt could reasonably have persuaded some jurors that the death penalty was not the proper punishment in Mr. Franklin's case. They could have believed "that the ultimate penalty should not be exacted, lest a mistake . . . [be] made." King v. Strickland, 748 F.2d at 1464. If any jurors did harbor such a feeling, they reasonably could have believed as well that the court's sentencing instructions precluded their consideration of it.

The jury was expressly directed to answer only the two questions presented to it at the sentencing stage. It was provided no other way in which to express its view of whether death was the appropriate punishment for Mr. Franklin in light of all the evidence and inferences from the evidence.[8] Nor was the

8. In Cordova v. State, 733 S.W.2d 175, 190 n.3 (Tex. Crim. App. 1987), the trial court instructed the jury that it could consider "all of the evidence" in answering the special issues. The appellate court held that "this instruction sufficiently instructed the jury, albeit indirectly, that it could consider any mitigating evidence in determining the answers to the special issues". Even this "indirect[]" instruction was not contained in Mr. Franklin's sentencing instructions.

jury told--as defense counsel's proffered instructions would have--that upon the finding of any factor that called for a sentence less than death, it could properly answer either of the special issue questions "no." Without the proffered instruction, therefore, "a reasonable juror could have interpreted the instruction," Sandstrom v. Montana 442 U.S. 510, 514 (1979), to forbid the consideration of any factor which was not evidently relevant to one of the two statutory questions. Residual doubt about Mr. Franklin's guilt, as we demonstrate below, was not self-evidently relevant to either statutory question. Thus, the failure to instruct upon its relevance or to provide some other procedural mechanism through which the jury could consider residual doubts about guilt in its sentencing deliberations precluded consideration of that factor in the determination of Mr. Franklin's sentence.

The trial court's failure to instruct also permitted the jury to exclude from its consideration any residual doubt about Mr. Franklin's guilt. As a practical matter, there was no logical connection between the two special issue questions and doubt about Mr. Franklin's guilt. Accordingly, without an instruction like that proffered by Mr. Franklin's counsel, which explained that there could properly be a connection between any mitigating factor and the statutory questions,[9] there can be no

9. See e.g., Defendant's Special Requested Charge on Punishment No. One ("[y]ou are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death Penalty . . . may be sufficient to cause you to have a reasonable doubt as to whether . . . the true answer to any of

assurance that the jury considered, rather than excluded, any doubt about guilt from its sentencing deliberations.

Residual doubt about Mr. Franklin's guilt was not self-evidently relevant to either of the special issue questions. The first question asked whether the jury found "beyond a reasonable doubt" that the homicide "was committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." [T.I--54]; JA 15. In convicting Mr. Franklin, the jury had already found beyond a reasonable doubt that he had "intentionally committ[ed] the murder" of Ms. Moran. In light of this finding, the jury could logically have concluded that it had already determined "beyond a reasonable doubt," as well, that the homicide "was committed deliberately and with the reasonable expectation that the death of the deceased . . . would result." Not surprisingly, this is exactly what the prosecution argued. [R.XIII--2976] Unless told that residual doubt about Mr. Franklin's specific intent could be considered in relation to this question, the jurors could logically have concluded that such doubt was irrelevant to the question. Any residual doubts they may have had about whether Mr. Franklin was involved at all in killing Ms. Moran, or whether his acts actually caused her death, were even less likely to be considered as relevant to this question.

Similarly, residual doubt about Mr. Franklin's guilt was not self-evidently relevant to the second special issue question. To

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the Special Issues is 'yes' . . . .")

prove "a probability that [Mr. Franklin] would commit criminal acts of violence that would constitute a continuing threat to society," [T.I--54]; JA 15 (Special Issue Number Two), the prosecution relied upon Mr. Franklin's history as a rapist prior to the homicide of Ms. Moran, as well as his reputation in the community for violence. Mr. Franklin was unable to raise any doubt about the accuracy of these facts. On the basis of these facts alone, the jury could have answered the second special issue question "yes," for it is commonly understood that a defendant's past conduct is indicative of his probable future behavior. See Barefoot v. Estelle, 463 U.S. 880, 902-03 (1983); Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986). Thus, any doubt the jury might have entertained as to whether Mr. Franklin murdered Ms. Moran could have seemed irrelevant, to reasonable jurors, in their deliberations concerning his probable future dangerousness.

Accordingly, since Mr. Franklin's jury was not obliged to attend to any residual doubt about guilt--by logic or by direction of the court--there is an unacceptable risk that the jury excluded this factor from its sentencing deliberations. The jury may not have "listened" to this evidence, to which "Lockett requires the sentencer to listen." Eddings v. Oklahoma, 455 U.S. at 115 n.10.

2. Mr. Franklin's Prior Prison Record; Good Character Traits And No Probability of Future Dangerousness If Incarcerated

The evidence of Mr. Franklin's prior prison record presented

two distinct mitigating circumstances. As the Court explained in Skipper v. South Carolina, from such a record "the jury could have drawn favorable inferences . . . regarding petitioner's character and his probable future conduct if sentenced to life in prison." 106 S.Ct. at 1671 (emphasis supplied). An adjustment to prison life which demonstrates the ability to abide by established rules and to refrain from violence in an environment where violence is commonplace, reflects extremely positive traits of character. In order to live a well-behaved and well-adjusted life in prison, Mr. Franklin had to be able to exercise self-discipline, show respect for the rights and interests of others, and have the ability to work out disputes rationally and peacefully. In addition, such a record provided a powerful basis for concluding that Mr. Franklin would probably continue to behave this way if he were sentenced to life imprisonment. Since it is reasonable to conclude that "a defendant's past conduct [is] indicative of his probable future behavior," Skipper v. South Carolina, 106 S.Ct. at 1671, Mr. Franklin's prior prison record pointed to the conclusion that he would continue to behave in a non-violent, well-adjusted way if he were returned to prison.[10] Because the trial court failed to give the

10. Indeed, the evidence of Mr. Franklin's prison record provided much stronger support for this conclusion than the evidence before the Court in Skipper. Nearly half of Mr. Franklin's term of imprisonment was served after he was convicted of rape in 1970 and before he allegedly committed the murder of Ms. Moran in 1975. Accordingly, his good behavior during this time is not in the least suspect, as the concurring Justices in Skipper found Skipper's to be. See Id., 106 S. Ct. at 1676. (Powell, J., concurring, joined by Burger, C.J., and Rehnquist,

instructions proffered by Mr. Franklin's lawyer, however, neither of these mitigating factors was given constitutionally adequate consideration.

Unlike residual doubts about Mr. Franklin's guilt, the mitigating circumstances associated with Mr. Franklin's prior prison record could logically have been considered in the course of answering the special issue questions, because they were relevant to the second question, which focused on the probable future dangerousness of Mr. Franklin. So counsel argued. The prosecution forcefully urged that there was a probability of future dangerousness, based on Mr. Franklin's reputation in the community for violence, his prior rapes, and the murder of Ms. Moran. [R.XIII--2958-2959, 2977] Defense counsel countered that there would be no such probability if Mr. Franklin were sentenced to life imprisonment, since he had never been violent or demonstrated a potential for violence when incarcerated. [R.XIII--2963-2964] As framed by counsel, therefore, the real issue before Mr. Franklin's jury was what the jury could do with the stipulated evidence of Mr. Franklin's prison record.

In light of the evidence, the arguments of counsel, and the instructions given by the court, a juror could logically have concluded that the mitigating factors evinced by Mr. Franklin's prison record were very substantial. Mr. Franklin's behavior in

J.)("[g]ood behavior in those circumstances [while in jail awaiting trial or awaiting sentencing after conviction] would rarely be predictive as to the conduct of the prisoner after sentence has been imposed")(emphasis in original).

prison demonstrated that he had the strength of character to live a peaceful, productive life within the structured environment of a prison, and that, so long as he stayed in prison there was no probability that he would pose a threat to others. While there was a chance that he might be released, that chance was slim and did not offset the positive aspects of Mr. Franklin's character revealed by his prison record.[11] For these reasons, the jury could logically have concluded that Mr. Franklin's prison record weighed in favor of a life sentence.

Notwithstanding these conclusions, the jury could reasonably have interpreted the court's instructions as precluding any discretion to answer the second special issue question "no" on this basis. Since the question was whether there was "a probability" that Mr. Franklin "would commit criminal acts of violence that would constitute a continuing threat to society," [T.I--54]; JA 15 (emphasis supplied), the jury could reasonably have decided, on the basis of the evidence, that it had no choice but to answer this question "yes." The jury could not completely deny that Mr. Franklin's past criminal behavior presented "a probability" of "a threat" of future violent harm to others. On balance, the jury could reasonably have concluded that this

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11. At one point in his argument, the prosecutor tried to emphasize the possibility that Mr. Franklin could be released if he were sentenced to life in prison. See R. XIII--2980. Mr. Franklin's objection to this argument was sustained, however, and the jury was instructed to disregard it. Id. This sequence of events could well have reinforced the jury's logical conclusion that the possibility of Mr. Franklin's release was not so serious as to be taken into account.

"probability" of "a threat" of danger was heavily outweighed by Mr. Franklin's strength of character and ability to live peacefully in prison. However, the sole question the jury was asked about future dangerousness did not apparently allow it to balance these competing factors.

Given these findings, which Mr. Franklin's jury reasonably could have made, it is plain that if his jury had been asked, "Should Mr. Franklin be sentenced to death," the answer could have been "no." However, neither of the special issues submitted to the jury, nor any instructions accompanying the issues, gave the jury any discretion to return this answer. Because of the constraints of the narrow questions it was required to answer, the jury was forbidden to sentence Mr. Franklin to life on the basis of its consideration of his ability to live peacefully in prison.

For this reason, Mr. Franklin's sentencing proceeding violated the third rule of Lockett: his sentencer was prevented from "giving independent mitigating weight" to the evidence in mitigation. 438 U.S. at 605. Under the Ohio statute examined in Lockett, as in this aspect of Mr. Franklin's case, the sentencer was not wholly precluded from considering certain mitigating circumstances. Nonstatutory circumstances could be considered in determining whether any of the statutory mitigating circumstances were present. 438 U.S. at 608. However, if none of the statutory circumstances was established--even if nonstatutory circumstances were established--"the Ohio statute mandate[d] the

sentence of death." Id. The "consideration of . . . [nonstatutory mitigating circumstances] . . . would generally not be permitted, as such, to affect the sentencing decision." Id.

The Texas statute operated in the very same way in Mr. Franklin's case. It forced the sentencer to filter the mitigating factors associated with Mr. Franklin's prison record through the narrow statutory question concerned with future dangerousness. Once that question was answered "yes," the sentencer had no available mechanism through which to impose a life sentence even though it reasonably could have concluded that life was the appropriate sentence. The inability of Mr. Franklin's jury to effect a life sentence in these circumstances "prevent[ed] the sentencer . . . from giving independent mitigating weight" to nonstatutory mitigating circumstances. 438 U.S. at 605 (emphasis supplied).

II.

ARTICLE 37.071 OF THE TEXAS CODE OF CRIMINAL PROCEDURE HAS NOT BEEN CONSTRUED TO EFFECTUATE THE INDIVIDUAL CONSIDERATION OF MITIGATING FACTORS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS AS INTERPRETED IN LOCKETT V. OHIO

A. Introduction

The preceding section showed that, under the particular facts of this case, the sentencing jury was precluded from considering relevant mitigating factors, permitted to exclude these factors, and prevented from giving them independent weight. As a result, Mr. Franklin's death sentence is invalid. The judgment of the court of appeals should accordingly be reversed

and Mr. Franklin should be resentenced in a proceeding that comports with the requirements of Lockett. See Hitchcock v. Dugger, 107 S.Ct. 1821, 1824-1825 (1987).

This section demonstrates that the unconstitutionally restrictive consideration of the mitigating evidence in Mr. Franklin's case did not occur by chance or by the aberrant rulings of the trial judge. Instead, the Lockett errors committed here occurred because mitigating circumstances instructions such as the ones he requested are not required under the decisions of the Texas Court of Criminal Appeals. Without them, there is a risk that the Lockett errors in his case will be repeated in others. To demonstrate the prevalence of this risk, Mr. Franklin will examine the construction of article 37.071(b) by the Texas Court of Criminal Appeals since Jurek v. Texas, in the light of the post-Jurek decisions of this Court.

B. The Promise of Jurek v. Texas

In Jurek v. Texas, 428 U.S. 262 (1976) this Court considered several constitutional challenges to the validity of the Texas death penalty scheme. The Court recognized that article 37.071 did not explicitly speak of mitigating circumstances. The constitutionality of the Texas system, therefore, depended on whether the enumerated special issues "allow consideration of particularized mitigating factors." Id. at 272. To make this determination, the Court looked to the Texas court's construction of special issue number two in the only two cases it had then decided. Thus, in Jurek v. State, 522 S.W.2d 934 (Tex. Crim.

App. 1975), aff'd, 428 U.S. 262 (1976), the Court of Criminal Appeals had "indicated that it will interpret this second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." Id. at 273. It was this indication that the Texas court would broadly interpret the facially narrow second special issue which caused this Court to reject petitioner's Eighth and Fourteenth Amendment challenges. See Lockett v. Ohio, 438 U.S. 586, 607 (1978).

Since 1976 this Court has adhered to Jurek's analysis of Texas' capital sentencing scheme. See Pulley v. Harris, 465 U.S. 37, 51 (1984)(proportionality review not required); Barefoot v. Estelle, 463 U.S. 880, 906 (1983)(psychiatric testimony admissible at punishment phase). In a recent case, however, the United States Court of Appeals for the Fifth Circuit was faced with a challenge to the application of article 37.071 similar to that which Mr. Franklin now urges.

> We recognize that Jurek specifically upheld the Texas statute, as the state argues. Developing Supreme Court law, however, recognizes a constitutional right that the jury have some discretion to decline to impose the death penalty. There is a question whether the Texas scheme permits the full range of discretion which the Supreme Court may require. Perhaps, it is time to reconsider Jurek in light of that developing law.

Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680. Specifically, two post-Jurek developments are significant.

First, as noted above, at the time Jurek was decided, this Court had only two reported cases upon which to base its critical conclusion that the Texas Court of Criminal Appeals had construed the second special issue "so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show." Jurek v. Texas, 428 U.S. at 273. Since 1976, the Texas Court of Criminal Appeals has construed all three special questions in scores of cases. An examination of these cases demonstrates that the Texas court has retreated from its earlier commitment to broadly interpret article 37.071 to "allow consideration of particularized mitigating factors." Id. at 272.

Second, a number of post-Jurek decisions of this Court, beginning with Lockett v. Ohio, 438 U.S. 586 (1978), and concluding with Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), are inconsistent with the Texas Court of Criminal Appeals' post-Jurek treatment of mitigating evidence.

C. Since 1976 the Texas Court Has Consistently Narrowed, Not Broadened, An Already Facially Narrow Statute

1. Texas refuses to require supplementation of the special issues by instructions to consider mitigating circumstances

Jurek v. State, 522 S.W.2d 934 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262 (1976), was the first capital case under article 37.071 to reach the Texas Court of Criminal Appeals. Id. at 936 n.1. There the court held that the special issues provided for by article 37.071(b) "channel the jury's consideration on punishment and effectively insure against the arbitrary and wanton imposition of the death penalty." Id. at

939. Accordingly, the court rejected the notion that a specific list of factors in addition to the special issues is required to be submitted to the jury.

> The fact that an exhaustive and precise list of factors is not specifically included does not indicate that the jury is without adequate guidelines. We are inclined to believe that the factors which determine whether the sentence of death is an appropriate penalty in a particular case are too complex to be compressed within the limits of a simple formula. However, there are some factors which are readily apparent and are viable factors for the jury's consideration. In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of this prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however, inflamed, could withstand.

Id. at 939-940.

Since that time, the Texas court has consistently reiterated that the purpose of the special issues is to provide the guidance to the sentencer that is required by the Constitution. E.g., Green v. State, 682 S.W.2d 271, 286 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); Evans v. State, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980); Brown v. State, 554 S.W.2d 677, 679 (Tex. Crim. App. 1977). A majority of the court has further held that, consistently with Jurek v. State, no further guidance on

mitigation is required beyond that provided by the special issues.

Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980), appears to be the first post-Jurek decision on this issue. There Quinones requested an instruction that "[e]vidence presented in mitigation of the penalty may be considered should the jury desire, in determining the answer to any of the special issues." Id. at 947. The trial court denied this request and submitted the special issues without explanation. The Court of Criminal Appeals affirmed.

> The question then is whether the language of the special issue is so complex that an explanatory charge is necessary to keep the jury from disregarding the evidence properly before it. In King v. State, 553 S.W.2d 105 (Tex. Crim. App. 1977), cert. denied, 434 U.S. 1088, 98 S.Ct. 1284, 55 L.Ed.2d 793 (1978), this Court held that the questions in Art. 37.071 used terms of common understanding which required no special definition. The jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence. No additional charge is required.

Id. Accord, Richardson v. State, __S.W.2d__, No. 68, 934 (Tex. Crim. App. October 28, 1987), slip op. 58; Cordova v. State, 733 S.W 2d 175, 190 (Tex. Crim. App. 1987); Demouchette v. State, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986); Clark v. State, 717 S.W.2d 910, 920-921 (Tex. Crim. App. 1986), cert. denied, 107 S.Ct. 2202 (1987); Anderson v. State, 701 S.W.2d 868, 873 (Tex. Crim. App. 1985), cert. denied, 107 S.Ct. 239 (1986); Penry v. State, 691 S.W.2d 636, 654 (Tex. Crim. App. 1985), cert. denied, 106 S. Ct.

834 (1986); Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 190 (1985); Williams v. State, 622 S.W.2d 116, 121 (Tex. Crim. App. 1981), cert. denied, 455 U.S. 1008 (1982). As noted in Cordova v. State, 733 S.W.2d at 189, "Under our capital punishment scheme and procedures, mitigation is given effect by whatever influence it might have on a juror in his deciding the answers to the special issues." The court further acknowledged that, in Texas, jurors are advised on mitigating evidence "indirectly." Id. at 190 n.3.

Undeniably, the Texas procedure which relies wholly upon the special issues to provide the constitutionally necessary guidance for consideration of mitigating evidence is exceedingly narrow. See Lockett v. Ohio, 438 U.S. 586, 607 (1978). The extent of its narrowness is well illustrated in Johnson v. State, 691 S.W.2d 619 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 184 (1985). There the appellate court found no error in the refusal to instruct the jury on its option to recommend life imprisonment, since there was no provision in the special issues for such a charge:

> This clearly is not the law. The jury is supposed to consider all the evidence and answer the special issues based upon that evidence. The judge then assesses the punishment, depending upon the answers, at death or life. The jury charge in this case correctly instructed the jury on the law. Appellant did not request any additional charges. The special issues adequately guide the jurors in weighing the mitigating and aggravating circumstances presented by the evidence.

Id. at 626. See also Adams v. State, 577 S.W.2d 717, 729 (Tex.

Crim. App. 1979), rev'd on other grounds, 448 U.S. 38 (1980) (special issues do not comprehend leniency inquiry).

Three judges on the court of criminal appeals, however, have taken issue with the conclusion that the narrow special issues are sufficient by themselves to guide the jury on mitigating evidence:

> If we are insure the constitutionality of 37.071, we must not only give lip service to broadly interpreting it; we must also apply it as interpreted. This could easily be effected by requiring a jury instruction on mitigating evidence. It is folly for the Court to first acknowledge a capital murder defendant's right to produce mitigating evidence, give the jury no guidance in its use, then presume these 12 laypersons know the holdings of Lockett and Eddings until the defendant affirmatively proves the contrary.

Stewart v. State, 686 S.W.2d at 125-26 (Clinton, J. joined by Teague and Miller, J.J., dissenting)(emphasis in original); see also Johnson v. State, 691 S.W.2d at 627 (Clinton, joined by Miller, J., concurring).

The specific concern of the minority was that certain evidence by its very nature "is at once damning and mitigating." Id. at 125. As examples, the dissenters listed mental disease and childhood deprivation. Although such factors might be mitigating in that they may lead the jury to exercise mercy, at the same time they may establish a probability of future dangerousness, thus compelling an affirmative answer to the second issue. According to these judges, the narrow Texas procedure does not permit the jury to accord independent weight to all relevant mitigating circumstances, in violation of Lockett

v. Ohio Id. at 125-126. To insure that Texas procedure complies with Lockett, the dissenters would require an instruction on mitigating evidence.

2. Special issue number one does not properly include consideration of mitigating circumstances since an affirmative answer logically follows anytime a person is convicted of intentional murder

Special issue number one is submitted in every capital case in Texas. Here it asked:

> Do you find from the evidence beyond a reasonable doubt that the conduct of the defendant, Donald Gene Franklin, that caused the death of Mary Margaret Moran, was committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

[T.I--54]; JA 15. This Court declined in Jurek to decide whether the first issue properly included consideration of mitigating factors and instead deferred to the Texas Court of Criminal Appeals. Jurek v. Texas, 428 U.S. 272 n.7. It is now clear that the Texas court has not construed this issue to include consideration of mitigating circumstances.

Initially it is important to note that two key components of this issue--"beyond a reasonable doubt" and "deliberately"--are not required to be defined under Texas law. See Marquez v. State, 725 S.W.2d 217, 241 (Tex. Crim. App. 1987)(proof beyond a reasonable doubt); Russell v. State, 665 S.W.2d 771, 780 (Tex. Crim. App. 1983)(deliberately).[12] In Jurek, this Court pointed out that the Texas court had "yet to precisely define" certain

12. Neither was defined in Mr. Franklin's case.

terminology in issue number two. Jurek v. Texas, 428 U.S. at 273. Implicit in this is the recognition that such definitions would be useful in evaluating an issue's capacity for guidance. That no such definitions have yet been given is one indication of the lack of guidance in the Texas system. C.f. Godfrey v. Georgia, 446 U.S. 420, 429 (1980)(jury given no guidance concerning statutory terms); see Williams v. State, 674 S.W.2d 315, 322 (Tex. Crim. App. 1984)(while first issue is confusing, and definition would have been helpful, it is not essential).

Additionally, special issue number one simply does not focus the jury's attention upon any mitigating factor.[13] By the time the punishment phase of the trial is reached, a rational juror could only answer this question yes.

Since "intentionally" is the exclusive culpable mental state for capital murder under Tex. Penal Code Ann. § 19.03(a)(2), every person convicted of capital murder in the course of robbery

13. Although the Jurek Court envisioned a specific mitigating function that could be served by special issue number three, no similar attempt was made regarding issue number one. Jurek v. Texas, 428 U.S. at 272 n.7. The Texas Court of Criminal Appeals has specifically rejected the claim that this issue affirmatively precludes consideration of mitigating circumstances. See Stewart v. State, 686 S.W.2d 118, 121 (Tex. Crim. App. 1984), cert. denied, 106 S. Ct. 190 (1985). On the other hand, the court has not attempted to explain how the issue leads the sentencer to consider mitigating circumstances. To the contrary, the court appears satisfied that sufficient mitigation guidance can come from the other special issues. Thus, in Quinones v. State, 592 S.W.2d 933 (Tex. Crim. App.), cert. denied, 449 U.S. 893 (1980), the court refused to require an "explanatory charge" on mitigation because "[t]he jury can readily grasp the logical relevance of mitigating evidence to the issue of whether there is a probability of future criminal acts of violence." Id. at 947 (emphasis supplied).

or kidnapping has necessarily been determined to have acted intentionally. As noted, "deliberately" is typically not defined in Texas. "Intentionally" is defined, however, as required by Tex. Penal Code Ann. § 6.03(a)(Vernon 1974). Accordingly, the jury in Mr. Franklin's case was instructed that: "A person acts 'intentionally,' or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result." [R.I--30] Considering both the failure to define "deliberately," and the definition given for "intentionally," it cannot fairly be argued that the jury could have perceived a difference between these two words. If it perceived no difference, then a "yes" answer to special issue number one was automatic once the jury found, as it did, that the defendant had acted intentionally. Clearly, a question which must be automatically answered against the accused provides no guidance for the jury's exercise of sentencing discretion. See Stewart v. Texas, 106 S. Ct. 190, 193 n.4 (Marshall, J., dissenting from denial of certiorari).

Justice Blackmun has captured the meaningless of this special issue in his dissenting opinion in Barefoot v. Estelle, 463 U.S. 880 (1983):

> It appears that every person convicted of capital murder in Texas will satisfy the other requirement relevant to Barefoot's sentence, that "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result . . ."

> because a capital murder conviction requires a finding that the defendant intentionally or knowingly cause[d] the death of an individual.

Id. at 917 n.1.

Although the Texas Court of Criminal Appeals has "repeatedly and resoundingly rejected" this contention, e.g, Marquez v. State, 725 S.W.2d 217, 244 (Tex. Crim. App. 1987), its decisions are not entirely consistent. In King v. State, 631 S.W.2d 486, 502 (Tex. Crim. App.), cert. denied, 459 U.S. 928 (1982), the court noted the "tremendous amount of confusion and dissension among the bench and bar over the meaning and import of the word "deliberately." In Blansett v. State, 556 S.W.2d 322, 327 n.6 (Tex. Crim. App. 1977), the court recognized the obvious: "[A]" jury having found that defendant intentionally committed a capital murder to be consistent would have to find that the act was deliberately done." And, very recently, in Gardner v. State, 730 S.W.2d 675, 680 (Tex. Crim. App. 1987), the court noted that "absent applicability of the law of parties, it will be the extraordinary case in which evidence sufficient to prove an 'intentional' murder for purposes of § 19.03(a)(2) will not also serve in whole or in part to establish that the killing was 'committed deliberately and with the reasonable expectation that . . . death . . . would result.'" See Penry v. Lynaugh, __F.2d __, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680 (answer "likely to be yes").

The best indication that this issue is meaningless is that in twelve years of reported decisions, not a single one has been reversed on appeal for insufficient evidence on special issue number one. This fact gives substance to Justice Blackmun's observation in Barefoot that this special issue is in fact not an issue at all once a defendant has been convicted of capital murder. To state it another way, article 37.071(b)(1), and the construction of it adopted by the Texas Court of Criminal Appeals, is such as to render it useless in directing the jury's consideration of mitigating evidence. Accordingly, it cannot fairly be contended that special issue number one properly includes consideration of mitigating factors.

3. Special issue number three has limited potential for mitigation and then only when submitted

Tex. Code Crim. Proc. Ann. art. 37.071(b)(3)(Vernon Supp. 1987) provides for a third special issue in some cases:

> if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Unlike question number one, question number three has been expressly construed to permit the jury to consider "particularized mitigating circumstances." Evans v. State, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980). See Esquivel v. McCotter, 777 F.2d 956, 957 (5th Cir. 1985). Two things are important about this issue. First, due to its very nature, it has a limited potential for consideration of mitiating circumstances. See Horne v. State, 607 S.W.2d 556, 558 n.3 (Tex. Crim. App. 1980)("may be

true that jury . . . will more than likely answer this issue against the accused"). Second, special issue number three, is only submitted where there is evidence raising provocation. E.g., Marquez v. State, supra, 725 S.W.2d at 224; Hernandez v. State, 643 S.W.2d 397, 401 (Tex. Crim. App. 1982).[14] Practically speaking the third special issue "rarely enters into the decision of the jury." Penry v. Lynaugh, ___F.2d___, No. 87-2466 (5th Cir. November 25, 1987), slip op. 679.

4. Special issue number two is insufficient to require consideration of all mitigating circumstances

In the present case the jury was instructed:

> Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society?

[T.I--54]; JA 15.

In Jurek the Court noted that the "Texas Court of Criminal Appeals has yet to define precisely the meanings of such terms as 'criminal acts of violence' or 'continuing threat to society.'" Jurek v. Texas, 428 U.S. at 273. In the intervening eleven years, it still has not done so. Indeed it has held that these terms, as well as "probability," need not be defined for the jury. See King v. State, 553 S.W.2d 105, 107 (Tex. Crim. App. 1977). Nor is it necessary to define "proof beyond a reasonable

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14. There was no such evidence in Mr. Franklin's case, and special issue number three was not submitted.

doubt." See Marquez v. State, 725 S.W.2d at 241.[15]

Apart from the lack of definitions, there are other problems with the construction given special question number two by the Texas Court of Criminal Appeals.

This Court has made it clear that the sentencer must consider both the character and record of the individual offender and the circumstances of the offense. See Woodson v. North Carolina, 428 U.S. 280, 304 (1976); see also Booth v. Maryland, 107 S.Ct. 2529, 2535 (1987)(jury's "constitutionally required task" is to determine sentence in light of background and record of the accused and the circumstances of the crime). By their very nature, issues number one and three are concerned only with historical facts involving the offense itself. See Horne v. State, 607 S.W.2d 556, 563 (Tex. Crim. 1980)(Roberts, J., concurring). The answer to these issues will depend, almost invariably, solely on the circumstances of the offense. Only the second issue then, has even the potential for focusing on the "particularized circumstances of the . . . individual offender." Yet the Texas court has many times held that the circumstances of the instant offense itself can alone be sufficient to sustain an affirmative finding to issue number two. E.g., Green v. State, 682 S.W.2d 271, 289 (Tex. Crim. App. 1984), cert. denied, 470 U.S. 1034 (1985); McMahon v. State, 582 S.W.2d 786, 792 (Tex. Crim. App. 1978), cert. denied sub. nom. McCormick v. Texas, 444

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15. None of these terms were defined in Mr. Franklin's case.

U.S. 919 (1979); Duffy v. State, 567 S.W.2d 197, 208 (Tex. Crim. App. 1978), cert. denied, 439 U.S. 991 (1978).

Thus, Texas appears to have come full circle since Jurek v. State, 522 S.W.2d at 939-940, where it noted that special issue number two is broad enough to comprehend an inquiry into various individualized circumstances of the capital defendant, including his age, criminal record and mental condition. This construction by the court, that the circumstances of the offense alone can support a "yes" answer to issue number two, amounts to a recognition of the extremely limited role of that issue in guiding and focusing a juror's consideration on the particularized circumstances of the individual offender. In Barefoot v. Estelle, 463 U.S. 880, 896 (1983), the Court recognized that future dangerousness is a constitutionally acceptable criterion for imposing the death penalty. Mr. Franklin does not dispute that it is an appropriate factor among the many that should be considered. However, it cannot constitutionally be the sole criterion. Yet, that is the law of Texas.

5. The Constitutional promise of the Texas statute has been exceedingly diminished by the Texas court's application of the statute since Jurek

This Court in Jurek expressly relied on the Texas state court's interpretation of article 37.071 in holding that that statute provided the guidance required by the Constitution. As recognized two years later in Lockett v. Ohio, 438 U.S. 586 (1978), article 37.071

> survived the petitioner's Eighth and Fourteenth Amendment attack because three justices concluded that the Court of Criminal Appeals had broadly interpreted the second question--despite its facial narrowness--so as to permit the sentencer to consider "whatever mitigating circumstances" the defendant might be able to show.

Id. at 607. On July 2, 1976, decisions were also announced upholding the facial validity of the death penalty statutes of Georgia and Florida. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976). In Lockett, 438 U.S. 586 (1978), the Court remarked that "[n]one of [these] statutes . . . clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Id. at 607 (emphasis supplied).

Since 1976 this Court has re-examined both the Georgia and Florida statutes in light of subsequent construction by those states' courts. As a result, death sentences imposed upon prisoners in both states have been invalidated, notwithstanding the Court's earlier decisions in Gregg and Proffitt. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Godfrey v. Georgia, 446 U.S. 420 (1980). A similar examination of article 37.071, in light of subsequent construction by the Texas Court of Criminal Appeals, demonstrates that that court is interpreting the statute much more narrowly than was apparent in 1976. The result of this narrow interpretation is that consideration of mitigating evidence is being unconstitutionally restricted, as it was in Mr. Franklin's case.

D. Developing Law in This Court Has Made Plain That the Unfulfilled Promise of the Texas Statute Is Constitutionally Intolerable

1. Texas has unconstitutionally narrowed the jury's discretion to decline to impose the death sentence

On the one hand, a state must narrow the class of persons subject to execution by giving the sentencer specific and detailed guidance. However, "[i]n contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 107 S. Ct. 1756, 1772-1773 (1987)(emphasis in original). There is a "tension . . . between [these] two central principles of our Eighth Amendment jurisprudence." California v. Brown, 107 S. Ct. 837, 841 (1987)(O'Connor, J., concurring). Clearly, this tension can be constitutionally resolved by the proper jury instructions which give the jury discretion to decline to impose the death penalty. Just as clearly, however, no resolution is achieved in Texas by an unexplicated submission of the special issues which too narrowly restrict the discretion required by the Constitution.

This is well illustrated by Adams v. State, 577 S.W.2d 717 (Tex. Crim. App. 1979), rev'd on other grounds, 448 U.S. 38 (1980). There the defendant sought an instruction which would have permitted the jury to extend him leniency, if it felt he deserved it, even though the special issues were answered affirmatively. Id. at 729. The court of criminal appeals

rejected this contention, concluding that the Supreme "Court clearly did not intend that the authority be given such broad discretion to decide whether a given defendant ought to receive the death penalty." Id. (emphasis supplied). The court went on to find that "[t]he three issues specified in Art. 37.071, supra, provide this direction and limit the discretion of the jury so as to prevent the arbitrary or capricious imposition of the death penalty." Id. at 730 (emphasis supplied). The Adams court was correct in holding that the special issues limit the jury's discretion. This is the vice rather than the virtue of the Texas system, however. As recognized in McCleskey, the Constitution restricts the "State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 107 S. Ct. at 1773. Article 37.071, which limits discretion to evidence relevant only to the narrow special issues, is irreconcilable with McCleskey.

2. By restricting the jury to "certain enumerated" special issues, Texas limits consideration of nonstatutory mitigating circumstances

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the advisory jury was given a list of statutory mitigating circumstances which it was allowed to consider. The sentencing judge later announced that he was "mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances." Id. at 1824 (emphasis in original). This Court reversed the death sentence, holding that "it could not be clearer that the advisory jury was

instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the p.oceedings therefore did not comport with the requirements of Skipper . . . Eddings . . . [and] Lockett . . . ." Id.

In a case like Mr. Franklin's, there is no perceptible difference between the Texas procedure, in which the jury is directed to answer "certain enumerated" statutory questions, and the procedure employed in Hitchcock. If there is a difference, it is only that the Texas system is even more restrictive, because in Florida the list of potentially mitigating circumstances is more comprehensive than are the Texas special issues. See Hitchcock v. Dugger, 107 S.Ct. at 1823 n.3.

3. As applied in a case like Mr. Franklin's, Article 37.071(b) is indistinguishable from the Ohio statute invalidated in Lockett

Section 2929-04(B) of the Ohio Revised Code, discussed in Lockett v. Ohio, 438 U.S. 586 (1978), required imposition of the death penalty if at least one aggravating factor was found, unless at least one of the three following mitigating circumstances was established by a preponderance of the evidence:

> (1) The victim of the offense induced or facilitated it.
>
> (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion or strong provocation.
>
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of

insanity.

Id. at 607.

The Ohio Supreme Court had upheld its statute "because the mitigating circumstances in Ohio's statute are 'liberally construed in favor of the accused.'" Id. at 608. Specifically the sentencer "may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established." Id. at 608 (emphasis supplied).

This Court upheld the Texas statute in Jurek despite its facial narrowness, because the Texas Court of Criminal Appeals--like the Ohio Supreme Court--had indicated it would construe special issue number two to allow the defendant to bring before the jury "whatever mitigating circumstances he could show." Jurek v. Texas, 428 U.S. 262, 273 (1976). This indication came from Jurek v. State, 522 S.W.2d at 939-940 in which the Texas court had stated:

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

Jurek v. Texas, 428 U.S. at 272-273 (emphasis supplied).

In Ohio, however, a similar procedure was condemned, for

> even under the Ohio court's construction of the statute, only the three factors specified in the statute can be considered in mitigation of the defendant's sentence.

Lockett v. Ohio, 438 U.S. 586, 608 (1978). Mitigating factors beyond the statutory factors "would generally not be permitted, as such, to affect the sentencing decision." Id.

When the Court approved the Texas statute, this vice was not apparent even though, as in Ohio, the jury was asked to consider only a narrow range of questions. There was the promise from the Texas Court of Criminal Appeals that the jury could consider "what ever mitigating circumstances [the defendant] could show," and there was no indication, as there was in Ohio, that the jury's consideration of these circumstances "would generally not be permitted, as such, to affect the sentencing decision." Subsequent history has shown, however, that this promise was illusory. The Texas statute, like the Ohio statute, now clearly forbids a sentencing decision to be based upon mitigating evidence unrelated to the statutory questions.

Sumner v. Shuman, 107 S.Ct. 2716 (1987) articulates most graphically the constitutional fault in such a sentencing scheme. There the Court considered Nevada's capital procedure where death was mandatory upon a finding of two "indicators": conviction for murder while in prison under a statute which yielded a sentence of life imprisonment without parole. Id. at 2724. Finding that these two indicators "do not provide an adequate basis on which to determine whether the death sentence is the appropriate

sanction in any particular case," the death sentence was reversed.

> Not only do the two elements that are incorporated in the mandatory statute serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but they say nothing of the "[c]ircumstances such as the youth of the offender, . . . the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct.

Id. at 2725. Although the Texas statute clearly permits the jury to consider more potentially mitigating evidence than did the Nevada statute, its special issues are also "incomplete indicators," which are silent on the circumstances of the offender such as youth, intoxication, or mental condition. Accordingly, the narrow Texas statute provides a constitutionally inadequate basis to determine the appropriateness of the death sentence.

4. Lockett requires the sentencer to listen; Texas does not

In Jurek, the Texas Court of Criminal Appeals construed article 37.071 permissively. Recognizing that it did not mandate consideration of mitigating factors on its face, the court nonetheless approved the statute because "the jury could consider" various factors, such as the age, record and mental condition of the defendant. Jurek v. State, 522 S.W.2d 1934, 939, 940 (Tex. Crim. App. 1975), aff'd, 428 U.S. 262 (1976)(emphasis supplied). A decade later, Texas remains content with a wholly permissive system. In Anderson v. State, 701

S.W.2d 868, 873-874 (Tex. Crim. App. 1985), cert. denied, 107 S.Ct. 239 (1986), the court refused to require additional instructions because article 37.071 "allows the jury to consider mitigating evidence."

This Court, in Jurek v. Texas, 428 U.S. 262 (1976), also noted the permissive nature of article 37.071. After saying that "the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors," the court quoted the language from Jurek v. State in which the Texas court indicated that, in answering special issue number two, "the jury could consider" factors including the defendant's age, criminal record and mental condition. Id. 273; see also Roberts (Larry) v. Louisiana, 431 U.S. 633, 637 n.6 (1977).

Unlike the Texas court, however, this Court has since made it clear that consideration of mitigating circumstances is not merely permissive. Thus, in Eddings v. Oklahoma, 455 U.S. 104 (1982) this Court reversed a death sentence after determining that the sentencer had refused to consider certain relevant mitigating evidence.

> The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> * * *
>
> On remand, the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating

circumstances.

Id. at 115, 117 (emphasis supplied). As the Court further pointed out: "Lockett requires the sentencer to listen." Id. at 115 n.10. See also McCleskey v. Kemp, 107 S.Ct. 1756, 1773 (1987)("the Constitution limits a state's ability to narrow a sentencer's discretion to consider relevant evidence"); California v. Brown, 107 S.Ct. 837, 839 (1987)(consideration is "constitutionally indispensible"); Skipper v. South Carolina, 106 S.Ct. 1669, 1671 (1986)(sentencer may not refuse to consider); Spaziano v. Florida, 468 U.S. 447, 459 (1984)("constitutional obligation" to evaluate unique circumstances of defendant).

5. Merely permitting the presentation of all relevant mitigating evidence does not insure that the jury will consider this evidence

In concluding that the Texas procedure did not violate the Eighth and Fourteenth Amendments to the United States Constitution, the Jurek Court wrote:

> By authorizing the defense to bring before the jury at the separate sentencing hearing whatever mitigating circumstances relating to the individual defendant can be adduced, Texas has insured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function.

Jurek v. Texas, 428 U.S. 262, 276 (1976). But subsequent decisions of the Court establish that a capital sentencer's consitutional obligation to consider mitigating evidence is not satisfied simply because the defense is able to bring all mitigating circumstances before it. Hitchcock v. Dugger, 107 S.Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). In

both cases the petitioners were allowed to introduce evidence in mitigation, apparently without limitation. Hitchcock v. Dugger, 107 S. Ct. at 1824; Eddings v. Oklahoma, 455 U.S. at 107-108. Despite their unlimited freedom to introduce evidence, this Court reversed both sentences of death because the sentencers had refused to consider the evidence of mitigating circumstances presented. Hitchcock v. Dugger, 107 S. Ct. 1824; Eddings v. Oklahoma, 455 U.S. at 113.

There is a good reason for this rule. It is by now axiomatic that, because the penalty of death is qualitatively different from all others, there is a heightened need for reliability in sentencing procedures. E.g., Caldwell v. Mississipri, 105 S.Ct. 2633, 2645 (1985); Zant v. Stephens, 462 U.S. 862, 884-885 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976). As Justice O'Connor noted in Eddings, a capital sentencing determination should not leave it to speculation

> whether the trial judge and the Court of Criminal Appeals actually considered all of the mitigating factors and found them to be insufficient to offset the aggravating circumstances . . . .
>
> Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

Eddings v. Oklahoma, 455 U.S. 104, 119 (O'Connor, J., concurring).

Even if Texas law permits the unfettered introduction of relevant mitigating circumstances, it is wholly speculative whether the jury actually considers these circumstances under the

Texas special issue procedure. Only jury instructions connecting mitigating circumstances with the special issues submitted, such as those proposed by Mr. Franklin and refused by his trial judge, can assure that mitigating evidence is given its constitutionally indispensable place in the capital sentencing process. A proper jury instruction "fosters the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" California v. Brown, 107 S.Ct. 837, 840 (1987); C.f. California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring)(instructions taken as a whole "must clearly inform the jury that they are to consider any relevant mitigating evidence").

III.

A SURVEY OF THE VARIOUS CAPITAL SENTENCING SYSTEMS IN THE UNITED STATES REVEALS THAT NO OTHER STATE HAS PROVIDED SUCH INADEQUATE PROCEDURAL SAFEGUARDS TO INSURE COMPLIANCE WITH LOCKETT V. OHIO.

A. Practice in Other Jurisdictions: The Weight of Current Legislative Judgment

Presently 33 states besides Texas have statutes providing for jury participation in capital sentencing. The New York statute has been declared unconstitutional for failure to provide for consideration of individualized circumstances of the offender. People v. Smith, 479 N.Y.S.2d 706, 725 (N.Y. 1984), cert. denied, 105 S. Ct. 1226 (1985). Of the other 32 states, 31 have explicit statutory provisions regarding mitigating evidence. See Ala. Code § 13A-5-46-e (1982); Ark. Stat. Ann. § 41-1304 (1987); Cal. Penal Code § 190.3 (Supp. 1987); Colo. Rev. Stat. §

16-11-103(2)(a)(1986); Conn. Gen. Stat. Ann. § 53a-46a (g)(West 1985); Del. Code Ann. tit. 11, § 4209(c)(4)(1979); Fla. Stat. Ann. § 921.141(2) (West 1985); Ga. Code Ann. § 17-10-30(b)(1984); Ill. Ann. Stat. Ch. 38 § 9-1(c)(Smith-Hurd Supp. 1987); Ind. Code Ann. § 35-50-2-9(c)(Burns Supp. 1987); Ky. Rev. Stat. Ann. § 532.025(2)(Baldwin 1981); La. Code Crim. Proc. Ann. art. 905.3 (West Supp. 1987); Md. Ann. Code art. 27, § 413 (Supp. 1987); Mass. Gen. Laws Ann. Ch. 279, § 68 (West Supp. 1987); Miss. Code Ann. § 99-19-101 (2) (Supp. 1987); Mo. Ann. Stat. § 565.032.1 (Vernon Supp. 1987); Nev. Rev. Stat. § 175.554 (1986); N.H. Rev. Stat. Ann. § 630:5 II(b)(1986); N.J. Stat. Ann. § 2C:11-3 (West. Supp. 1987); N.M. Stat. Ann. § 31-20A-2(1987); N.C. Gen. Stat. § 15A-2000(b)(1983); Ohio Rev. Code Ann. § 2929.03(D)(2)(Baldwin 1982); Or. Rev. Stat. § 163.150(2) (b)(1985); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(Purdon 1982); S.C. Code Ann. § 16-3-20(C)(Law. Co-op. Supp. 1986); S.D. Codified Laws Ann. § 23A-27A-1 (Supp. 1987); Tenn. Code Ann. § 39-2-203(e) (1982); Utah Code Ann. § 76-3-207(2)(Supp. 1987); Va. Code § 19.2-264.4 (1983); Wash. Rev. Code Ann. § 10.95.060(4) (Supp. 1987); Wyo. Stat. § 6-2-102(d)(1977); see also Model Penal Code § 210.6 (proposed official draft 1962). Examination of case law from the remaining state, Oklahoma, demonstrates that juries there are specifically instructed on mitigating circumstances. See Van Woundenberg v. State, 720 P.2d 328, 336 (Okla. Crim. App. 1986).

Recently, Oregon adopted a special issue procedure virtually identical to article 37.071. See Or. Rev. Stat. § 163.150

(1985). Significantly, however, the Oregon jury is to be specifically instructed to consider any mitigating circumstances offered in evidence, including, but not limited to, the defendant's age, the extent and severity of the defendant's prior criminal conduct and the extent of the mental and emotional pressure under which the defendant was acting at the time the offense was committed. . . ." Or. Rev. Stat. § 163.150(2)(b) (1985). That is, Oregon has statutorily mandated explicit instruction on the mitigating circumstances which are supposed to be discerned by Texas juries without instruction. Cf. Jurek v. State, 522 S.W.2d at 939-940.

The mere fact that other states have chosen different capital sentencing schemes does not prove that the Texas procedure is unconstitutional. See Spaziano v. Florida, 468 U.S. 447, 464 (1984). On the other hand, this Court frequently conducts comparative analyses to determine the purport of current legislative judgment. E.g., Enmund v. Florida, 458 U.S. 782, 793 (1982); Beck v. Alabama, 447 U.S. 625, 637 (1980); Coker v. Georgia, 433 U.S. 584, 596 (1977); Woodson v. North Carolina, 428 U.S. 280, 293 (1976). An examination of that judgment nationwide leads to the conclusion that no where but in Texas is consideration of mitigating evidence left so completely to happenstance and disjoined from any operative effect on the death sentencing decision as it was under Texas practice in Mr. Franklin's case.

B. Of the Lower Federal Courts Only the Fifth Circuit Has Approved Schemes Similar to Texas

The United States Court of Appeals for the Fifth Circuit has expressly held that the Texas death penalty scheme is not unconstitutional for failure to require an instruction on the use of mitigating evidence. Esquivel v. McCotter, 777 F.2d 956, 958 (5th Cir. 1985); O'Bryan v. Estelle, 714 F.2d 365, 385 (5th Cir. 1983).[16]

No other lower federal court which has considered this question has approved instructions on mitigation which are as spartan as those found in Texas.

The Eleventh Circuit requires "that the trial judge 'clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death.'" Moore v. Kemp, 809 F.2d 702, 731 (11th Cir. 1987); Peek v. Kemp, 784 F.2d 1479, 1494 (11th Cir. 1986). Texas requires no instruction on the option to recommend against death, see Johnson v. State, 691 S.W.2d 619, 626 (Tex. Crim. App. 1984), cert. denied, 106 S.Ct. 184 (1985), any more than it requires instruction on mitigating circumstances.

In Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986) the court of appeals rejected a challenge to the Utah statute, noting that the jury instructions "emphasized that mitigating factors

16. Very recently, a panel of the Fifth Circuit addressed a claim similar to the one made by Mr. Franklin. Although the court rejected that claim because it believed itself bound by Jurek v. Texas and previous Fifth Circuit opinions, it went on to discuss the developing law in this Court and to suggest that "[p]erhaps, it is time to reconsider Jurek in light of that developing law." Penry v. Lynaugh, __F.2d__, No. 87-2466 (5th Cir. November 25, 1987), slip op. 680.

should be considered and that they could prove decisive in the balancing process." Id. at 1265. No such instruction is given in Texas.

And in Briley v. Bass, 750 F.2d 1238 (4th Cir. 1984), the court of appeals upheld the constitutionality of the Virginia death penalty statute after recognizing that the jury charge, which instructed the jury on five occasions to consider mitigating evidence, left the definite impression that the jury was to take into account all mitigating evidence. See also Rook v. Rice, 783 F.2d 401, 405 (4th Cir. 1986)(jury instructed to weigh aggravating and mitigating circumstances).

C. That Specific Standards Are Not Required For Balancing Aggravating and Mitigating Circumstances Does Not Mean That No Guidance At All Is Required

Texas relied strongly on Zant v. Stephens, 462 U.S. 862 (1983), in the courts below in opposition to Mr. Franklin's claim. Careful examination of Zant, however, reveals that it does not diminish Mr. Franklin's contention.

In Zant the question was whether invalidation by the Georgia Supreme Court of one of three statutory aggravating circumstances found by the jury rendered the defendant's death sentence impermissible. Id. at 864. In the context of this issue, concerned solely with aggravating factors, the Court commented that Jurek v. Texas "makes clear that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." Id. 875 n.13. Mr. Franklin has no quarrel whatsoever with that proposition. See McCleskey v. Kemp,

107 S.Ct. 1756, 1778 n.37 (1987). His position, also is simply that, even though specific balancing standards are not required, a capital sentencing jury must nonetheless be instructed to consider all mitigating evidence presented, and must be given some way to express its consideration of mitigating evidence in its verdict. This is certainly true where the state's method of submitting the question of a capital sentence to the jury risks--as the special issue used in Texas does--that mitigating evidence will otherwise be wholly disregarded. In Zant, the jury was explicitly authorized to consider "all facts and circumstances presented in extinuation [sic], mitigation . . . [and] any mitigating circumstances. . . authorized by law." Zant v. Stephens, 456 U.S. 410, 411 n.1 (1982). Mr. Franklin's jury was given no such change, and was precluded from considering relevant mitigating circumstances because of the narrowness of the two special issues presented to it. If Lockett, Eddings, Skipper and Hitchcock are to apply in Texas as elsewhere, life cannot constitutionally be taken under such a sentencing procedure.

CONCLUSION

For these various reasons, the decision below should be reversed.

Respectfully submitted:

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By 
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NO. 87-5546

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner

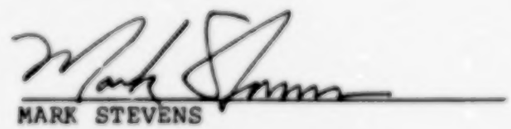
v.

JAMES A. LYNAUGH, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS,

Respondent

BRIEF FOR PETITIONER
ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

I, Mark Stevens, a member of the bar of this Court, hereby certify that on this 7th day of December, 1987, one copy of the Petition for Writ of Certiorari in the above-entitled case was mailed, first class, postage prepaid to William Zapalac, Assistant Attorney General for the Texas, P. O. Box 12548, Capitol Station, Austin, Texas 78711, counsel for the respondent herein. I further certify that all parties required to be served have been served.


MARK STEVENS

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

AMENDMENT VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF THE STATE OF TEXAS

Tex. Penal Code Ann. § 19.03 (Vernon 1974):

(a) A person commits an offense if he commits murder as defined under § 19.02(a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981):

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the

deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

RESPONDENT'S

BRIEF

No. 87-5648

Supreme Court, U.S.
FILED
JAN 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

DONALD GENE FRANKLIN,
Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS
DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Do this special issues submitted at the punishment phase of a capital murder trial pursuant to article 37.071(b) of the Texas Code of Criminal Procedure adequately provide for jury consideration of any aspect of the defendant's character or record or any circumstances of the offense that the defendant proffers as a basis for a sentence less than death?

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TABLE OF AUTHORITIES

Constitutions, Statutes and Rules

No. 87-5546

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1987

DONALD GENE FRANKLIN,

Petitioner,

v.

JAMES A. LYNAUGH, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

RESPONDENT'S BRIEF

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES James A. Lynaugh, Director, Texas Department of Corrections, Respondent[1] herein, by and

---

[1]For clarity, Respondent in this Court, James A. Lynaugh, Director, Texas Department of Corrections, will be referred to as "the state," the real party in interest. Petitioner, Donald Gene Franklin, will be referred to as "Franklin."

through his attorney, the Attorney General of Texas, and files this Brief.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit was delivered on July 30, 1987, and is reproduced in the Joint Appendix[2] at 32-34. *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987). The federal district court's memorandum opinion, order of dismissal, and final judgment are reproduced at JA 21-31. *Franklin v. Lynaugh*, No. SA-86-CA-608 (W.D.Tex. 1986) (unpublished).

JURISDICTION

The judgment of the Court of Appeals was entered on July 30, 1987. No rehearing was sought. The petition for writ of certiorari was timely filed on September 25, 1987. The jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Franklin bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution, and Section 19.03 of the Texas Penal Code and Article 37.071 of the Texas Code of Criminal Procedure.

[2]The state adopts the system of citation employed by Franklin. Thus, "JA" refers to the Joint Appendix; "T." followed by a volume and page number refers to the transcript in the state trial court, which contains the documents, pleadings, motions, and orders; and "R." followed by a volume and page number refers to the statement of facts in the state trial court.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

The state has lawful and valid custody of Franklin pursuant to a judgment and sentence of the 197th Judicial District Court of Cameron County, Texas, in Cause No. 82-CR-159-C, styled *The State of Texas v. Donald Gene Franklin*.[3] Franklin was indicted by the Bexar County Grand Jury for the capital offense of murder of Mary Margaret Moran, committed in the course of committing or attempting to commit robbery or kidnapping, to which he entered a plea of not guilty. The trial was moved on a change of venue to Cameron County, where Franklin was tried by a jury and found guilty of capital murder. After hearing evidence relating to punishment, the jury answered affirmatively the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 1987). Accordingly, on March 20, 1982, Franklin was sentenced to death by lethal injection. Venue and jurisdiction then were transferred to the 289th District Court of Bexar County, Texas.

The Texas Court of Criminal Appeals affirmed Franklin's third conviction and sentence on June 26, 1985. *Franklin v. State*, 693 S.W.2d 420 (Tex. Crim. App. 1985). This Court denied a petition for writ of certiorari on February 24, 1986. *Franklin v. Texas*, ___ U.S. ___, 106 S.Ct. 1238 (1986). On March 13, 1986, the trial court

[3]Franklin had been convicted of the same offense twice before and sentenced to death after each conviction. The first conviction was reversed by the Texas Court of Criminal Appeals. *Franklin v. State*, 606 S.W.2d 818 (Tex.Crim.App. 1979). The trial court granted a new trial after Franklin's second conviction when it determined that the jury charge had been defective. *State of Texas v. Donald Gene Franklin*, Cause No. 310706.

scheduled Franklin's execution to be carried out before sunrise on April 16, 1986. Franklin filed a motion to withdraw the warrant of execution and an application for writ of habeas corpus in the trial court on April 3, 1986. The motion to withdraw the warrant of execution was denied on April 4, 1986, and the court recommended that the application for writ of habeas corpus be denied. The Court of Criminal Appeals denied a stay of execution and denied habeas corpus relief on April 8, 1986. *Ex parte Franklin*, Application No. 15,849-01.

On April 9, 1986, Franklin filed an application for stay of execution and a petition for writ of habeas corpus in the United States District Court for the Western District of Texas, San Antonio Division. *Franklin v. McCotter*, No. SA-86-CA-608. The court granted a stay of execution on April 10, 1986. The case was referred to a magistrate, who conducted an evidentiary hearing on April 30 and May 1, 1986. The magistrate filed a memorandum and recommendation recommending relief be denied. The district court issued a memorandum opinion on July 9, 1986, adopted the magistrate's findings and dismissed the petition. On July 15, 1986, the district court denied a certificate of probable cause to appeal.

The trial court scheduled a new execution date for September 16, 1986. Franklin applied to the Court of Appeals for the Fifth Circuit for a certificate of probable cause to appeal. The court granted the certificate on September 12, 1986, and also entered a stay of execution. On July 30, 1987, the court issued its opinion affirming the denial of habeas corpus relief and vacating the stay of execution. *Franklin v. Lynaugh*, 823 F.2d 98 (5th Cir. 1987). Franklin then filed a petition for writ of certiorari, which this Court granted. *Franklin v. Lynaugh*, ___ U.S.___, 108 S.Ct. 221 (1987).

B. Statement of Facts

The record reflects that Mary Margaret Moran disappeared at approximately midnight on the night of July 25, 1975, from the parking lot of the Veterans' Administration Hospital, where she worked as a nurse (R.VIII-2048). Her car was found partially backed out of its parking place, with the front door open and the engine turned off (R.VIII-2103, 2210). There was a pool of blood near the car and a trail of blood leading away from it (R.VIII-2105). After an extensive four-day search, involving not only the police but local civic groups, Boy Scout troops, and private citizens as well, Ms. Moran was found, alive, on July 30, 1975 (R.IX-2445-48; 2477-78). She was lying nude in a muddy ditch in a thickly weeded field near the hospital (R.IX-2548). Her clothing was strewn around the area near her body (R.X-2522). There were lacerations on her neck, a puncture wound to the right of her Adam's Apple, and seven stab wounds on her upper body. One of the stab wounds perforated her heart (R.X-2622). The wounds were infected and infested with insects (R.X-2618). Although she was still alive when found, she died several hours later in the hospital (R.VIII-2075; X-2628). Cause of death was listed as shock resulting from loss of blood due to multiple stab wounds, dehydration, and blood in the left chest cavity (R.X-2628).

A man identified as Franklin was seen in the hospital parking lot shortly before Ms. Moran disappeared (R.VIII-2129). A car driven by Franklin was observed speeding away from the area near Ms. Moran's car (R.VIII-2207). A security guard attempted to give chase but was unable to keep up with the car. He did notice and take down the car's license plate number. The car was traced to Franklin (R.IX-2263).

Within hours of Ms. Moran's disappearance, police arrived at Franklin's home and obtained his consent to

search the premises (R.IX-2276). Police discovered a pair of trousers soaking in a pail of bloody water (R.IX-2277; X-2593). In a trash can outside the house, they found a partially burned denim purse (R.IX-2300), identified as belonging to the victim (R.VIII-2062), as well as her checkbook, surgical scissors, and other personal effects (R.IX-2407). There were blood stains in the car, as well as a blood-stained rope (R.IX-2431). The blood matched the blood type of the victim (R.X-2597). Police also recovered a knife from the trash can (R.X-2407). Franklin was taken into custody at approximately 7:00 a.m. on July 26, 1975 (R.IX-2279).

Laboratory tests revealed that soil samples from shoes belonging to Franklin matched that in the area where Ms. Moran was found (R.X-2662). Hair found on a shirt belonging to Franklin matched the victim's (R.X-2678-79), as did hair found in Franklin's car (R.X-2683). Seed and plant samples taken from the trousers found soaking in Franklin's house matched samples at the scene were the victim was found (R.X-2689-90). Finally, it was determined that the cuts in Ms. Moran's clothing could have been caused by the knife found at Franklin's house (R.X-2687).

Franklin did not testify himself, but did call one witness who testified as to the care Ms. Moran received in the hospital, and one who testified that in his opinion, Ms. Moran should have been taken to a different hospital that was better equipped to handle emergencies (R.IX-2754-57). In his summation to the jury, Franklin's attorney argued that the identifications by the state's witnesses were unreliable (R.XII-2886, 2900), and that, even if Franklin committed the act, he did not have the requisite intent because medical records indicated that Ms. Moran received inadequate treatment in the hospital (R.XII-2895-99). The jury found Franklin guilty of capital murder as charged (T.I-13A).

The state's evidence at the punishment phase of the the trial consisted of testimony from four police officers that Franklin's reputation for being a peaceful and law-abiding citizen was bad (R.XIII-2925-35). In addition, Phyllis Green testified that Franklin had raped her approximately seven months prior to Ms. Moran's murder (R.XIII-2935). The state also introduced records showing Franklin's conviction and imprisonment for a previous rape (R.XIII-2946). Franklin introduced a stipulation that he had had no disciplinary problems while he had been in the Texas Department of Corrections from 1971-74, for the prior rape conviction, and from 1976-80, while he was in custody on the current charges (R.XIII-2952-53). The jury returned affirmative answers to the two special issues submitted pursuant to Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1981), and Franklin was sentenced to death by the trial court (J.A. 18-20).

SUMMARY OF ARGUMENT

To be constitutional, a capital-sentencing statute must allow the defendant to introduce whatever relevant mitigating evidence he wishes the jury to consider. In addition, the jury must not be limited in its discretion to consider such evidence. Texas accomplishes this by submitting to the jury a set of special issues. The questions focus the jury's attention on the defendant's personal responsibility and moral guilt for the offense. The jury is authorized to return affirmative answers to the special issues only if it is persuaded beyond a reasonable doubt. To make this determination, the jury must necessarily consider all of the mitigating evidence before it. Requiring an additional instruction on how to consider mitigating evidence would be merely redundant and would not improve the reliability of the sentencing decision.

The Constitution does not entitle a defendant to rely on residual doubts about his guilt during the punishment phase of his trial. Therefore, even if the Texas statute does not allow for such an option, it is not constitutionally defective. However, the first special issue, concerning whether the defendant acted deliberately in committing the offense, does allow the defendant an opportunity to raise any residual doubt to the level of reasonable doubt, resulting in a negative answer to the question. Thus, the Texas statute does, in fact, allow for juror expression of residual doubt about the defendant's guilt.

Franklin's argument that the Texas scheme prevented his jury from giving independent mitigating weight to evidence of his good behavior in prison fails for two reasons. First, Texas does not restrict mitigating evidence to certain statutorily defined circumstances. Whatever evidence of his character or record or the circumstances of the offense the defendant chooses to offer is admissible and must be considered by the jury in making its punishment decisions. Second, the evidence of his good behavior was relevant only to the issue of whether he would be a future threat to society. Franklin concedes that the jury could understand the significance of the evidence to the second special issue. His attempt to ascribe any additional mitigating value to the evidence is futile.

ARGUMENT

I.

THE TEXAS CAPITAL-SENTENCING STATUTE AS APPLIED MEETS THE CONSTITUTIONAL REQUIREMENT OF INDIVIDUALIZED SENTENCING WITHOUT THE NECESSITY OF A SPECIAL INSTRUCTION ON MITIGATING EVIDENCE.

Franklin contends that Texas' capital sentencing procedure, found to be constitutional by this Court in *Jurek v. Texas*, 428 U.S. 262 (1976), no longer complies with Eighth Amendment jurisprudence as explicated in cases decided since *Jurek*. Specifically, he asserts that the special issues a jury must answer in deciding punishment in a capital case are so narrowly drawn that, absent a specific instruction on how to consider mitigating evidence, the jury can be prevented from considering relevant mitigating evidence and from engaging in the type of individualized sentencing mandated by the Constitution. Because the trial court in his case gave no such instruction, he argues that the jury could have excluded relevant mitigating evidence from its punishment deliberations so that his resulting death sentence was unconstitutionally imposed.

A. The Texas capital-sentencing statute was upheld in Jurek because it narrows the class of persons eligible for the death penalty and allows for jury consideration of mitigating evidence.

A capital-sentencing statute must meet two requirements to pass constitutional scrutiny. First, the

statute must be structured so that the death penalty is not imposed in an arbitrary and unpredictable fashion. *Gregg v. Georgia,* 428 U.S. 153, 189 (1976). It must provide "objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Second, a capital-sentencing statute must provide for individualized sentencing by allowing the defendant to present evidence in mitigation of a sentence of death. Mandatory capital punishment statutes have been struck down because of their "lack of focus on the circumstances of the particular offense and the character and propensities of the offender," *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325, 333 (1976); and sentences under guided-discretion statutes have been vacated when the sentencer was prevented from considering aspects of the defendant's character or record or the circumstances of the offense. *See Lockett v. O'* 438 U.S. 586 (1978).

The Texas statute was found to satisfy both requirements in *Jurek v. Texas*, 428 U.S. 262 (1976). First, the offenses for which the state may seek to impose the death penalty are limited to intentional murders committed under strictly defined circumstances. Tex. Penal Code Ann. § 19.03 (Vernon Supp. 1988). Once a defendant is found guilty of capital murder, a separate sentencing hearing is conducted to determine whether the punishment will be life imprisonment or death. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon Supp. 1987). Finally, all convictions that result in a sentence of death are automatically reviewed by the Texas Court of Criminal Appeals. Id., art. 37.071(f). The Texas statute was thus structured so as to prevent the sentencing authority from imposing a sentence of death in an arbitrary and unpredictable fashion. *Jurek*, 428 U.S. at 276. Franklin does not challenge the validity of this aspect of the statute.

This Court also found that the Texas procedure provides for individualized sentencing. In Texas, after finding a defendant guilty of capital murder, the jury is not directly asked whether the punishment should be life imprisonment or death. Rather, the following set of special issues is submitted:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071(b). The jury must be persuaded beyond a reasonable doubt before a question may be answered affirmatively. If all of the issues submitted are answered "yes", the court sentences the defendant to death; otherwise, the sentence is life imprisonment.

In *Jurek* the Court noted that the special issues do not explicitly speak of mitigating circumstances. However, the Texas Court of Criminal Appeals had interpreted the second question so as to allow the defendant to present to the jury whatever mitigating evidence he might wish:

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look at the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps, than insanity, but more than the emotions of the average man, however inflamed, could withstand."

Jurek, 428 U.S. at 272, quoting *Jurek v. State*, 522 S.W.2d 934, 939-40 (Tex.Crim.App. 1975). The Texas statute puts before the jury "all possible relevant information about the individual defendant whose fate it must decide." *Jurek*, 428 U.S. at 276. In thus providing for individualized sentencing, Texas' procedure meets the requirements imposed by the Constitution.

Further, the Court recognized that no special instruction is necessary to guide a Texas jury in carrying out its sentencing function. Providing the jury with whatever mitigating evidence the defendant could show "ensured that the sentencing jury will have adequate guidance to enable it to perform its sentencing function." *Id.* at 276. And in a concurrence, Justice White, joined by Chief Justice Burger and Justice Rehnquist, agreed "that the issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them." *Id.* at 279.

B. The continued viability of the Texas capital-sentencing statute is not subject to doubt.

1. Jurors do not require special instructions to understand the significance of mitigating evidence with regard to the special punishment issues.

Franklin argues that the structure of the special issues might convince jurors that they are unable to consider certain evidence. He relies on the opinion expressed by three dissenting members of the Texas Court of Criminal Appeals. In *Stewart v. State*, 686 S.W.2d 118, 125-26 (Tex.Crim.App. 1984) *cert. denied*, 474 U.S. 866 (1985), Judge Clinton, joined by Judges Teague and Miller, noted that evidence of mental illness and childhood deprivation could be introduced by the defendant as mitigating circumstances, but could also be viewed as weighing in favor of a death sentence. The dissent opined that the jury ought to be instructed by the trial court that the evidence had to be considered as mitigating. *See also Johnson v. State*, 691 S.W.2d 619, 627 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 865 (1985) (Clinton, J., dissenting).

The minority members of the Court of Criminal Appeals themselves recognized, however, what this Court stated in *Eddings v. Oklahoma*, 455 U.S. 104 (1982): that evidence of difficult family history and of emotional disturbance is frequently introduced by defendants in mitigation, and juries can easily grasp its significance. *Eddings*, 455 U.S. at 115. Although the sentencing authority cannot refuse to or be precluded from considering certain evidence as mitigating, nothing in the Constitution requires that it be considered *only* as mitigating. This much is evident from the Court's

recognition in *Enmund v. Florida*, 458 U.S. 782 (1982), that, while a vicarious felony murderer may be executed in some states absent an intent to kill if sufficient aggravating factors are present, some of those same states make it a *mitigating* factor that the defendant was an accomplice to the murder and his own participation was relatively minor. *Enmund*, 458 U.S. at 791-92. It also follows from the requirement that the defendant be allowed to explain any evidence the state introduces in favor of the death sentence. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Like any circumstantial evidence, that introduced at the punishment phase of a capital murder trial can be susceptible of more than one interpretation. It is for the jury to determine the weight such evidence receives. *See Eddings*, 455 U.S. at 114-15 ("[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence"); *Barclay v. Florida*, 463 U.S. 939, 961 n. 2 (1983) (Stevens, J., concurring) (neither *Lockett* nor *Eddings* held that any particular weight must be given by the sentencer to mitigating evidence); *Zant v. Stevens*, 462 U.S. 862, 891 (1983) (Constitution does not require states to adopt specific standards for instructing jury how to consider aggravating and mitigating circumstances).

The Constitution requires the sentencer to listen to the defendant's mitigating evidence but does not usurp the sentencer's role in assessing the value of that evidence. Similarly, the Texas statute allows the defendant to submit to the jury whatever mitigating evidence he chooses to and requires the jury to consider that evidence in deciding punishment, but leaves to the jury the determination of what weight to give to it. *See Cordova v. State*, 733 S.W.2d 175, 189 (Tex.Crim.App. 1987) (in Texas, mitigating evidence is given effect by the influence it has on the jury during deliberations).

Other than evidence of mental or emotional disturbance, Franklin points to nothing that a defendant might offer in mitigation that the jury would not be able to consider in answering the special punishment issues. Instead, he speculates in general terms that "some" evidence "might" not appear relevant and thus not enter into the jury's deliberations. However, the special issues are in fact precisely drawn so that they focus the jury's attention on the defendant's personal responsibility and moral guilt. *See Tison v. Arizona*, ___U.S.___,___, 107 S.Ct. 1676, 1683 (1987); *Enmund v. Florida*, 458 U.S. at 801. Thus, the jury must consider any relevant mitigating evidence, *i.e.*, anything concerning the circumstances of the offense and the character or record of the defendant, in determining the answers to the issues.

The first special issue in Texas asks whether the defendant acted deliberately and with the reasonable expectation that the death of the victim or another would result. Contrary to Franklin's assertion, the answer to this question is not pre-ordained by the jury's finding that the defendant acted intentionally in committing the murder. The Court of Criminal Appeals has noted that "intentionally" and "deliberately" have different meanings in normal usage that a jury can appreciate. *Fearance v. State*, 620 S.W.2d 577, 584 (Tex.Crim.App.), cert. denied, 454 U.S. 899 (1981); *Heckert v. State*, 612 S.W.2d 549, 552 (Tex.Crim.App. 1981). The first special issue addresses the defendant's mental state not as it relates to his criminal culpability but as it concerns his moral guilt. Evidence that the murder was reflexive rather than reflective would clearly be relevant to the issue, as would evidence showing that a defendant convicted of capital murder under the law of parties did not personally kill, attempt to kill, or intend that lethal force be used. *Green v. State*, 682 S.W.2d 271, 287 (Tex. Crim. App. 1984), *cert. denied*, 470 U.S. 1034 (1985); *Means v. State*, 668 S.W.2d 366, 375 (Tex. Crim. App. 1983), *cert. denied*, 466 U.S. 945

(1984). The fact that in a given case a defendant might not have such evidence to present does not serve to invalidate the issue.

The third issue, too, is directed at the defendant's moral guilt and is relevant in cases where self-defense is pled.[4] Even though the jury might determine that the circumstances of the offense or of the defendant's character do not excuse his criminal guilt, such evidence could clearly be persuasive that his moral guilt is not such that he deserves the death penalty. *Cf. Smith v. State*, 676 S.W.2d 379, 393 (Tex. Crim. App. 1984), *cert. denied*, 471 U.S. 1061 (1985).

Similarly, the second special issue allows the defendant to present evidence of his character or record that tends to show that he is a good prospect for rehabilitation. Franklin identifies no specific evidence that a defendant might offer in regard to this special issue that is not obviously relevant to his future dangerousness, or that the jury is precluded from considering. He argues that the Court of Criminal Appeals has prevented adequate consideration of mitigating evidence by holding that the facts of the offense alone can be sufficient to support an affirmative finding to the special issue. *E.g., Green v. State*, 682 S.W.2d at 289. That is incorrect. The court's holding in *Green* does not preclude consideration of mitigating evidence. It simply recognizes that the facts of an offense can be relevant to whether a person will commit similar acts in the future and that, in a proper case, can outweigh the factors advanced in mitigation.

[4]Franklin's dismissal of the third special issue because it is only submitted in cases where raised by the evidence seems to imply that all mitigating factors must be relevant in every case. This clearly is not the case. Just as not every defendant will be able to point to a troubled upbringing or a history of mental or emotional disturbance, so, too, not every defendant will be able to claim that he killed in response to the victim's provocation.

Put another way, the court has merely implemented this Court's expressions in *Eddings* and *Stevens* that it is up to the sentencing authority to determine what weight to give mitigating evidence.[5]

Franklin further argues that the Texas capital-sentencing statute, as interpreted by the courts, merely *allows* the jury to take mitigating evidence into account, whereas *Lockett* and its progeny mandate that the jury "listen" to the evidence. Franklin's argument is purely speculative, and is directly contradicted by the manner in which the Texas statute actually operates. First, the special issues are carefully drawn so that the jury's attention is focused on those factors relevant to determining punishment in a capital case. Then the jury is instructed that it is to consider all of the evidence introduced at both phases of the trial in answering the special issues. Finally, the court instructs that jurors must be convinced beyond a reasonable doubt before the issues can be answered affirmatively. Unlike the situations in *Eddings* and *Hitchcock* v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987), where there were clear expressions that relevant evidence was not considered by the sentencing authority,

[5]Franklin also contends that the Texas statute is more restrictive than the one this Court found deficient in *Hitchcock v. Dugger*, ___U.S. ___, 107 S.Ct. 1821 (1987). In fact, the opposite is true. The Florida statute expressly limited the jury's consideration to certain enumerated mitigating factors. The Texas statute has no statutorily defined mitigating circumstances and anything about the facts of the offense or about his character or record that the defendant feels will redound in his favor is admissible and must be considered by the jury. This also disposes of his claim that the Texas statute, as applied, is indistinguishible from the Ohio statute at issue in *Lockett*. The only similarity between the statutes is that the Ohio statute restricted jury consideration to three mitigating circumstances, while Texas' statute asks the jury to answer three special issues. In answering the special issues, however, the Texas jury must consider all relevant mitigating evidence. *Pre-Lockett* Ohio juries had no such discretion.

Franklin points to nothing that suggests that Texas jurors do not follow their oaths and instructions.

Not only have subsequent decisions not raised questions about the Texas scheme, but the Court has repeatedly cited the Texas statute with approval as permitting jury consideration of relevant mitigating circumstances even though the special issues do not refer explicitly to mitigating factors. *See Lowenfield v. Phelps*, ___ U.S. ___, ___, No. 86-6867, slip op. at 13 (January 13, 1988); *Sumner v. Shuman*, ___ U.S. ___,___, 107 S.Ct. 2716, 2720 (1987); *Pulley v. Harris*, 465 U.S. 37, 48-50 & nn. 9, 10 (1984); *Zant v. Stevens*, 462 U.S. at 875 n. 13 (1983); *Barefoot v. Estelle*, 463 U.S. 880, 897 (1983); *Lockett v. Ohio*, 438 U.S. at 606-07. And in *Lockhart v. McCree*, ___ U.S. ___, ___, 106 S.Ct. 1758, 1769-70 (1986), the Court expressly recognized that the special punishment issues allow Texas juries sufficient discretion to consider all relevant mitigating evidence:

> Although purporting to limit the jury's role to answering several "factual" questions, in reality [the Texas capital sentencing scheme] vest[s] the jury with considerable discretion over the punishment to be imposed on the defendant. See [*Adams v. Texas*,] 448 U.S., at 46 ("This process is not an exact science, and the jurors under the Texas bifurcated procedure unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths"); cf. *Jurek v. Texas*, 428 U.S. 262, 273 (1976) (opinion of Stewart, POWELL, and STEVENS, JJ.) ("Texas law essentially requires that...in considering whether to impose a death sentence the jury may be asked to consider whatever evidence of

> mitigating circumstances the defense can bring before it").

While, on the one hand, the Texas special issues allow the jury sufficient discretion, they are not so vague that the jury's discretion is unguided and standardless:

> [T]he issues posed in the sentencing proceeding have a common-sense core of meaning and that criminal juries should be capable of understanding them. The statute does not extend to juries discretionary power to dispense mercy, and it should not be assumed that juries will disobey or nullify their instructions.

Jurek, 428 U.S. at 279 (White, concurring); *accord*, *Lowenfield v. Phelps*, ___ U.S. at ___, slip op. at 13.

In *California v. Ramos*, 463 U.S. 992 (1983), the Court considered the defendant's contention that, inasmuch as the sentencing jury at his capital trial had been instructed as to the governor's power to commute a life sentence, "basic principles of fairness" required that it also be instructed on the governor's power to commute a death sentence. The Court rejected this argument, reasoning as follows:

> Although such an instruction would be "neutral" in the sense of giving the jury complete and factually accurate information about the commutation power, it would not "balance" the impact of the Briggs Instruction, even assuming, *arguendo*, that the current instruction has any impermissible skewing effect. Disclosure of the complete nature of the commutation power would not eliminate any skewing in favor of death or

increase the reliability of the sentencing choice.

Id. at 1011.

The same is true in Franklin's case. As discussed above, the Court has consistently reaffirmed its holding in *Jurek* that there is no constitutional infirmity in the Texas statute as interpreted by the Court of Criminal Appeals. There is no "skewing" toward death as there would be, for example, if the jury were instructed on aggravating factors without requiring a parallel instruction on mitigating evidence. There is, in short, no defect in the statute as applied which might be cured by Franklin's proposed instructions. *A fortiori*, such an instruction is not mandated by the Constitution.

2. No decision of this Court since *Jurek* has changed the standards for jury consideration of mitigating evidence.

Since deciding *Jurek* in 1976 this Court has readdressed the issue of capital-sentencing procedures on several occasions. It has held that in crafting their statutes, the states may decide what factors are relevant to the sentencing decision and that the courts will ordinarily defer to these legislative determinations. *Booth v. Maryland*, ___U.S. ___, ___, 107 S.Ct. 2529, 2532 (1987). However, the standards the states employ to guide the sentencer's decision-making cannot be excessively vague. *California v. Ramos*, 463 U.S. at 1000-01 & n. 12 (1983); *Godfrey v. Georgia*, 446 U.S. 429 (1980). In addition, individualized sentencing requires that the state's evidence in favor of a death sentence must have some bearing on the defendant's personal responsibility and moral guilt, *Tison v. Arizona*, ___ U.S. at ___, 107 S.Ct. at 1683; *Enmund v. Florida*, 458 U.S.

782, 801 (1982), and the defendant must have the opportunity to explain or deny such evidence. *Ramos*, 463 U.S. at 1001; *Gardner v. Florida*, 430 U.S. 349 (1977).

However, Franklin contends that the Court has broadened its interpretation of individualized sentencing and that, without a specific instruction, Texas jurors might not appreciate the relevance of mitigating evidence to the special issues. To the contrary, an examination of the cases on which he relies demonstrates that the Court has reiterated that the state cannot limit a defendant's ability to introduce, and the sentencer's discretion to consider as a mitigating factor, any evidence relevant to "any aspect of the defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *California v. Brown*, ___ U.S. ___, ___, 107 S.Ct. 837, 839 (1987); *Lockett v. Ohio*, 438 U.S. at 604; *Jurek v. Texas*, 428 U.S. at 274. The application of these principles to specific situations has worked no substantive change in the requirement of individualized sentencing.

The Court first reviewed the individualized sentencing requirement in *Lockett v. Ohio*, 438 U.S. 586 (1978). The Ohio capital-sentencing statute defined only three mitigating circumstances that would allow for a sentence less than death. The sentencing authority could consider various non-statutory mitigating factors but only to help determine whether one of the statutorily defined circumstances was present. This scheme prevented the sentencer from giving independent mitigating weight to evidence of the defendant's character or record or to the circumstances of the offense, but that was not encompassed within one of the defined mitigating factors. Because this violated the requirement of individualized sentencing, the death sentence was reversed.

The issue next arose in *Eddings v. Oklahoma*, 455 U.S. 104 (1982). Eddings was sixteen years old when he murdered an Oklahoma highway patrolman. At trial he introduced considerable evidence of his unhappy upbringing and emotional disturbance. Nonetheless, the trial judge stated that he was prevented "as a matter of law" from considering that evidence in reaching his decision whether to impose the death penalty. *Id.* at 109. In addition, the Oklahoma Court of Criminal Appeals dismissed the evidence as irrelevant because it did not provide a legal excuse from criminal responsibility. *Id.* at 113. This Court determined that the evidence was relevant to Eddings' character and therefore was proper mitigating evidence. Just as the individualized sentencing doctrine prevented the state from withholding such evidence from the sentencer's view, it also mandated that the sentencing authority not refuse to consider the evidence. Eddings' death sentence was reversed because the sentencer did not give the necessary consideration to mitigating evidence.

Skipper v. South Carolina, ___ U.S. ___, 106 S.Ct. 1669 (1986), involved a specific application of *Lockett*. There, the defendant attempted to introduce evidence of his good behavior while in custody awaiting trial as a mitigating factor showing that he would not be a threat to society. The trial court excluded the evidence as irrelevant to any issue in the case. This Court concluded that the evidence did bear on the defendant's ability to adapt to prison life and, as such, might serve as a basis for a sentence less than death. *Id.* at ___, 106 S.Ct. at 1671. As in *Lockett*, the state had failed to allow for individualized sentencing by precluding the sentencer from considering relevant mitigating evidence.

The Court most recently discussed the individualized sentencing doctrine in *Hitchcock v. Dugger*, ___ U.S. ___, 107 S.Ct. 1821 (1987). There, the defendant had

introduced evidence of his troubled upbringing and his potential for rehabilitation, but the trial court's instructions to the jury expressly referred only to the statutorily defined mitigating circumstances, which did not include these factors. *Id.* at ___, 107 S.Ct. at 1824. After receiving the advisory jury's recommendation of death, the trial court noted that the statutory mitigating factors present in the case did not outweigh the statutory aggravating factors. Consequently, he sentenced the defendant to death. As in *Eddings*, the evidence proffered by Hitchcock was relevant mitigating evidence as that term had been previously defined, and its exclusion from the sentencer's consideration resulted in the death sentence being unconstitutionally imposed.

None of these decisions represent either a departure from or an extension of the principles informing *Jurek*. In each instance, the Court reiterated the rules applied in *Jurek*: that the state cannot preclude a capital defendant from presenting to the jury relevant mitigating evidence, *i.e.*, evidence concerning the circumstances of the offense or his character and record, and cannot limit the sentencing authority's discretion by preventing it from considering such evidence.

3. No decision by the Texas Court of Criminal Appeals has changed the standards for jury consideration of mitigating evidence.

Franklin contends that by refusing to require additional instructions, the Texas Court of Criminal Appeals has narrowed the scope of the state's capital-sentencing statute. On the contrary, the Texas court has remained firm in its interpretation of the statute upon which this Court relied in *Jurek*. It has reiterated that all relevant mitigating evidence is admissible during the

punishment phase of a capital murder trial. *Anderson v. State*, 701 S.W.2d 868, 873-74 (Tex.Crim.App. 1985), *cert. denied*, ___U.S. ___, 107 S.Ct. 239 (1986); *Johnson v. State*, 691 S.W.2d 619, 624 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 865 (1985) ("*Lockett* indicated clearly that prior record and aspects of the character of the defendant are the type of mitigating factors that should be permitted. Art. 37.071 and case law that has developed under Art. 37.071 demonstrate that exactly those types of mitigating circumstances are admissible."); *Stewart v. State*, 686 S.W.2d 118, 121 (Tex.Crim.App. 1984), *cert. denied*, 474 U.S. 866 (1985); *Quinones v. State*, 592 S.W.2d 933, 947 (Tex.Crim.App. 1980)[6]. In addition, the Texas court has construed the first special issue to also permit consideration of relevant mitigating circumstances:

> The first of the three issues under Art. 37.071(b) must allow consideration of mitigating factors as to whether the act was committed *deliberately*. If the jury does not unanimously answer "yes", the only authorized punishment is confinement for life. . . We do not find that subsequent construction by cases following *Jurek v. Texas*, supra, have limited the deliberateness issue so that proper consideration of mitigating circumstances is excluded.

[6]Not only has the Texas court affirmed death sentences on the basis that the special issues allow for admission of whatever relevant mitigating evidence the defendant has to offer, it has also reversed when the trial court failed to comply with the requirements of *Lockett*, *Eddings*, and *Skipper*. See *Cass v. State*, 676 S.W.2d 589 (Tex.Crim.App. 1984) (death sentence reversed because the trial court excluded testimony of five lay witnesses who "had known the defendant all his life" and who would have testified that he was unlikely to commit violent acts in the future.)

Williams v. State, 674 S.W.2d 315, 321-22 (Tex. Crim. App. 1984), *cert. denied*, 474 U.S. 1110 (1985) (emphasis in original).

Franklin criticizes the Court of Criminal Appeals' refusal in *Adams v. State*, 577 S.W.2d 717, 729 (Tex. Crim. App. 1979), to give a requested instruction that the jury could extend leniency, even if it answered the special issues affirmatively. He relies on the language in *McCleskey v. Kemp*, ___ U.S. ___, ___, 107 S.Ct. 1756, 1773 (1987), that the Constitution limits the "State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence" (emphasis in original). He appears to argue from this that the juries must have the option of granting mercy to a particular defendant, even if it determines that death is warranted under the law. This Court has never held that the states must provide for leniency in their capital-sentencing statutes. In *Jurek*, the Court expressly recognized that death is the mandatory punishment in Texas if all of the special issues are answered affirmatively. *Jurek*, 428 U.S. at 278 (White, J., concurring). *Jurek* also used language almost identical to that in *McCleskey* to describe the standard to be employed at sentencing: "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Jurek*, 428 U.S. at 271. *See also Lowenfield v. Phelps*, ___ U.S. at ___, slip op. at 13.

Now, twelve years after *Jurek*, the Texas capital-sentencing statute continues to satisfy the requirements of individualized sentencing mandated by the Eighth Amendment. None of this Court's post-*Jurek* decisions impose any new constitutional burden on the state or cast any doubt on the constitutionality of the Texas statute. Now, just as in 1976, the special issues on punishment focus the jury's attention on the defendant's personal

responsibility and moral guilt for the offense and allow the defendant to present any evidence he wishes concerning the circumstances of the crime and his own character and record. The jury is instructed that the state bears the burden of proving beyond a reasonable doubt that the special issues should be answered affirmatively and that it is to consider all of the evidence in arriving at its decision. The special issues are structured in such a way that the jury cannot answer them without taking into account all mitigating evidence offered by the defense. As submitted to the jury, the special issues possess a "common-sense core of meaning" and "juries can readily grasp the logical relevance of mitigating evidence" to the issues. *Cordova v. State*, 733 S.W.2d at 190. Because the statute thus allows for individualized sentencing, the reliability of the sentencing process would not be enhanced by an instruction regarding the jury's consideration of mitigating evidence.

II.

THE JURY IN FRANKLIN'S CASE ENGAGED IN THE INDIVIDUALIZED SENTENCING REQUIRED BY THE CONSTITUTION IN ASSESSING THE DEATH PENALTY.

Franklin contends that his case illustrates the alleged deficiencies of the Texas capital-sentencing statute. He asserts that because of the structure of the special issues and the nature of the mitigating evidence he offered, the jury might have believed it was precluded from considering his evidence, might have excluded the evidence from its deliberations, and might have failed to give the evidence independent mitigating weight. On the contrary, his case demonstrates just how the Texas statute operates in conformity with the the requirements of the Eighth Amendment.

A. A defendant is not constitutionally entitled to rely on "residual doubt" as to his guilt at the punishment phase of the trial.

Franklin points out that the state's case against him consisted of circumstantial evidence. He argues that although the evidence had convinced the jury beyond a reasonable doubt that he was guilty, there nonetheless might have been some jurors who harbored sufficient "residual doubts" that they might have felt that a sentence less than death was appropriate, and he claims that the special issues precluded the jurors from giving expression to these doubts. Therefore, he concludes, his death sentence was imposed in violation of the Eighth Amendment.

As discussed in Part I B 1, *supra*, the Constitution requires that the state not limit the defendant's presentation or the sentencer's consideration of relevant mitigating evidence. *California v. Brown*, ___ U.S. at ___, 107 S.Ct. at 839. In this context, however, "relevant mitigating evidence" has a precise meaning. It has been restricted to the circumstances of the offense and the character or record of the defendant. *Hitchcock v. Dugger*, ___ U.S. at ___, 106 S.Ct. at 1669; *Woodson v. North Carolina*, 428 U.S. at 304. This Court has steadfastly refused to include "residual doubts" about the defendant's guilt within the sweep of relevant mitigating evidence. *Lockhart v. McCree*, ___ U.S. at ___, 106 S.Ct. at 1769 (some states "do not allow the defendant to argue 'residual doubts' to the jury at sentencing."); *Id.* at 1781 (Marshall, J., dissenting) (noting that "this Court has consistently refused to grant certiorari in state cases holding that these doubts cannot properly be considered during capital sentencing proceedings.") Simply put, a defendant is not constitutionally entitled to rely on such

doubts as a mitigating factor.[7] Even if the Texas capital-sentencing statute does not allow the jury to consider residual doubts about the defendant's guilt in deliberating on the punishment issues, that does not render the statute, or death sentences obtained under it, invalid.

In fact, however, special issue one does allow for jury expression of any residual doubts about the defendant's guilt. Because the jury is required to find that the defendant acted not only intentionally but also deliberately, counsel has the opportunity during the punishment phase of the trial to raise any residual doubt as to guilt to the level of reasonable doubt.[8] Any juror so persuaded then would be able to answer the first issue negatively.[9]

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[7]The state bears the burden at punishment of proving beyond a reasonable doubt that the special issues should be answered affirmatively. To the extent that Franklin is arguing that the state must prove its case beyond *all* doubt, he is seeking to impose an unwarranted burden on the state.

[8]Counsel did not so attempt in Franklin's case.

[9]Franklin cannot argue that the term "intentional," an element of the offense of capital murder, and the term "deliberate," as used in the first special issue, are linguistic equivalents, thereby not allowing a jury to express residual doubt. The Texas Court of Criminal Appeals has consistently held that the two terms are not synonymous and that the term "deliberate" means "the thought process which emphases more than a will to engage in conduct and activates the intentional conduct." *Thompson v. State*, 691 S.W.2d 627 (Tex. Crim. App. 1984), *cert. denied*, ___ U.S. ___ 106 S.Ct. 184 (1985); *Fearance v. State*, 620 S.W.2d at 584. Moreover, Texas juries are, in fact, clearly able to distinguish between the two terms. *See Heckert v. State*, 612 S.W.2d 549 (Tex. Crim. App. 1981) (after finding defendant guilty of capital murder, jury answered first special issue negatively).

B. The second special issue allowed full jury consideration of the mitigating effects of Franklin's prior prison record.

During the punishment phase of his trial, Franklin introduced a stipulation that he had had no disciplinary problems while he was incarcerated for a prior rape (R.XIII-2952-53). During jury argument Franklin's attorney contended that this demonstrated that Franklin could adjust to prison life and that he would not be a danger to society if he were sentenced to life imprisonment (R.XIII-2963-65). He argued that the evidence warranted a negative answer to the second special issue: whether there was a probability that Franklin would commit acts of criminal violence that would constitute a continuing threat to society (R.XIII-2965).

Franklin acknowledges that the jury was able to understand the significance of the evidence with respect to the second issue even without an additional instruction. He contends, however, that this was evidence of his character relevant to the sentencing determination independent of whether he would be a future danger, and that the jury should have been permitted to give it independent mitigating weight. *See Lockett v. Ohio*, 438 U.S. at 605. On this basis, he asserts that because of the structure of the Texas special issues and the lack of specific instructions, the jury might not have considered this evidence as mitigating.

The Ohio statute at issue in *Lockett* required that the death penalty be assessed in particular cases unless the defendant established at least one of three statutory mitigating factors. Non-statutory mitigating factors could be given no effect in the sentencing decision except insofar as they shed some light on the circumstances delineated

in the statute. This Court held that a sentence of death imposed under this statute violated the Eighth Amendment because it did not allow the sentencer to consider, as mitigating factors, all aspects of a defendant's character or record or the circumstances of the offense proffered by the defendant. *Lockett*, 438 U.S. at 604, 608.

Lockett is distinguishable from Franklin's case in two respects. First, unlike Ohio, Texas does not limit mitigating circumstances to those defined by statute. Any evidence relating to the defendant's character or record or to the circumstances of the offense that the defendant wants to submit is admissible and is relevant to at least one of the special issues. The jury must consider the evidence when it makes its punishment decisions. Thus, the limitations imposed on the sentencer in Ohio in taking mitigating evidence into account do not exist in the Texas scheme.

Second, Franklin's assertion that evidence of his adaptability to prison life is relevant to the sentencing decision apart from what it might say about his future dangerousness is simply wrong. In *Skipper v. South Carolina*, ___ U.S. at ___, 106 S.Ct. at 1671, the Court considered whether testimony regarding a defendant's good behavior in jail constituted relevant mitigating evidence that the defendant must be allowed to put before the sentencing authority. Noting that a defendant's past conduct can be indicative of his probable future behavior, the Court held that the evidence "must be considered potentially mitigating." *Id.* at ___, 106 S.Ct. at 1671. It is obvious from the Court's discussion of the evidence that its relevance is to the issue whether the defendant will pose a future threat. *Id.*

Logic confirms that this is the appropriate consideration. The ability to adapt to prison conditions and to avoid disciplinary problems might form the basis

for a sentence less than death precisely because it indicates that the defendant might not be a danger to others. *See Skipper*, ___ U.S. at ___, 106 S.Ct. at 1672. That such evidence might also suggest valuable character traits, such as self-discipline, respecting the rights and interests of others, and the ability to work out disputes rationally and peacefully (Brief for Petitioner at 17) is simply another way of saying that it was evidence that the defendant would not be violent in prison and would not pose a danger to others. Franklin's attempt to ascribe mitigating value to the evidence apart from this is unavailing.

Further, there is simply nothing in the Texas sentencing scheme which prevented Franklin from so arguing to the jury. Defense counsel was free to characterize the evidence as he saw fit at his closing argument, and the jury would not have been precluded from accepting any such characterization if it so chose. It would then have been within the jury's carefully guided discretion to determine if, and to what extent, the evidence bore on the special issues it was required to answer.

Thus, the Texas capital-sentencing statute allows the defendant to present whatever mitigating evidence he wants to put before the jury. The special issues focus the jury's attention on the relevant sentencing considerations. In determining whether the state has proven beyond a reasonable doubt that the special issues should be answered affirmatively, the jury necessarily must consider all relevant mitigating evidence. Requiring an additional specific instruction on mitigating evidence would not provide for greater reliability in the process of deciding the defendant's sentence.

CONCLUSION

For the above reasons, the state requests that the judgment of the court below be affirmed.

Respectfully submitted,

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